No. 06-549

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

ANDREW C. MERGEN
DAVID C. SHILTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

ROGER R. MARTELLA, JR.
Acting General Counsel

MICHAEL LEE
Attorney
Environmental Protection Agency
Washington, D.C. 20460

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-71439, 03-72894

DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT, NATIONAL ASSOCIATION OF HOME BUILDERS; STATE OF ARIZONA; ARIZONA CHAMBER OF COMMERCE, INTERVENERS DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY, PLAINTIFFS-PETITIONERS

v.

ROBERT B. FLOWERS, CHIEF OF ENGINEERS AND COMMANDER, U.S. ARMY CORPS OF ENGINEERS, DEFENDANT-RESPONDENT, CHRISTINE TODD WHITMAN, ADMINISTRATOR U.S. ENVIRONMENTAL PROTECTION AGENCY, DEFENDANT-RESPONDENT GALE NORTON; STEVEN WILLIAMS, DEFENDANTS-RESPONDENTS, CONTINENTAL RESERVE II, LLC, DEFENDANT-INTERVENOR/INTERVENOR, HB LAND DEVELOPMENT COMPANY; STEPHEN A. OWENS, STATE OF ARIZONA, EX-REL, DIRECTOR ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY; GROSVENOR HOLDINGS; NATIONAL ASSOCIATION OF HOME BUILDERS; HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA; SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION; SAGUARO

RANCH INVESTMENTS LLC; SAGUARO RANCH DEVELOPMENT CORPORATION, DEFENDANT-INTERVENORS/INTERVENORS

Argued and Submitted: Nov. 1, 2004
Filed: Aug. 22, 2005

On Petition for Review of an Order of the Environmental Protection Agency. EPA No. 67-Reg. 79629, No. CV-02-01195-CKJ.

Before: REINHARDT, THOMPSON, and BERZON, Circuit Judges.

BERZON, Circuit Judge:

Under federal law, a state may take over the Clean Water Act pollution permitting program in its state from the federal Environmental Protection Agency (EPA) if it applies to do so and meets the applicable standards. This case concerns Arizona's application to run the Clean Water Act pollution permitting program in Arizona. When deciding whether to transfer permitting authority, the Fish and Wildlife Service (FWS) issued, and the EPA relied on, a Biological Opinion premised on the proposition that the EPA lacked the authority to take into account the impact of that decision on endangered species and their habitat.

The plaintiffs in this case challenge the EPA's transfer decision, particularly its reliance on the Biological Opinion's proposition regarding the EPA's limited authority. This case thus largely boils down to consideration of one fundamental issue: Does the Endangered Species Act authorize—indeed, require—the EPA to

consider the impact on endangered and threatened species and their habitat when it decides whether to transfer water pollution permitting authority to state governments? For the reasons explained below, we hold that the EPA did have the authority to consider jeopardy to listed species in making the transfer decision, and erred in determining otherwise. For that reason among others, the EPA's decision was arbitrary and capricious. Accordingly, we grant the petition and remand to the EPA.

I. Background

A. The National Pollution Discharge Elimination System (NPDES)

The Clean Water Act ("the Act"), passed in 1972, established the National Pollution Discharge Elimination ("pollution permitting") System. That System gave the EPA authority to issue permits for the discharge of pollutants into navigable waters. *See* 33 U.S.C. § 1342(a). The Act further provides that a state may apply to the EPA to administer the federal pollution permitting program regarding waters within its borders. § 1342(b). The EPA Administrator must determine whether the state has met nine specified criteria and "shall approve" state applications that meet those criteria. *Id.*

The state transfer provisions of § 1342(b) have proven popular. Arizona was the forty-fifth state to obtain pollution permitting authority from the EPA. *See* 67 Fed. Reg. 79,629 (Dec. 30, 2002) (announcing approval of Arizona's pollution permitting authority); 65 Fed. Reg. 50,528, 50,529 (Aug. 18, 2000) (listing then-approved states).

Once the EPA transfers a permitting program to a state government, the EPA Administrator maintains an oversight role to assure that the state follows Clean Water Act standards. 33 U.S.C. § 1342(c)(2). If the Administrator determines that the state is not following those standards, the Administrator must demand corrective action. If the state does not take such action, the Administrator must withdraw approval of the state program. § 1342(c)(3).

B. The Endangered Species Act

In 1973, one year after the enactment of the Clean Water Act, Congress passed the Endangered Species Act, "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn.Valley Auth. v. Hill*, 437 U.S. 153, 180, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978). The present case focuses on section 7 of the Endangered Species Act, 16 U.S.C. § 1536.

Section 7(a)(2) imposes substantive and procedural requirements on "each Federal agency" with regard to "any action authorized, funded, or carried out by such agency." 16 U.S.C. § 1536(a)(2). Each agency must "insure" that such actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." *Id.* Agencies must use the "best scientific and commercial data available" to make such decisions, and must do so "in consultation with and with the assistance of the Secretary [of the Interior]." *Id.*

Endangered Species Act regulations[1] describe the consultation and action requirements imposed on agencies. Section 7's requirements apply "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. An agency must determine if a proposed action "may affect" either endangered or threatened species (denominated "listed species," § 402.02) or those species' critical habitat, and, if so, must seek formal consultation with the FWS, or, for marine species, the National Marine Fisheries Service. § 402.14(a). During such consultations, the FWS issues a Biological Opinion analyzing whether the action is likely to jeopardize any listed species or its habitat. § 402.14(h). The federal agency then makes a final decision regarding whether and how to pursue the proposed action. § 402.15(a).

A Biological Opinion must include a "summary of the information on which the opinion is based," a "detailed discussion of the effects of the action on listed species or critical habitat," and "[t]he Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." § 402.14(h).

The "effects of the action" include "direct and indirect effects . . . together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline[, which] includes the past and present impacts of all Federal, State, or private actions and other human activities

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[1] The relevant Endangered Species Act regulations were jointly issued by the FWS, Department of the Interior, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, and Department of Commerce. *See* 50 C.F.R. ch. 4.

in the action area." § 402.02. "Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." *Id.*

By its terms, section 7(a)(2) applies only to "federal agenc[ies]," not to state governmental bodies. Accordingly, the EPA's pollution permitting decisions are subject to section 7(a)(2), but state pollution permitting decisions are not.

Noting that the "EPA now consults with the [FWS and National Marine Fisheries Service] under section 7 of the [Endangered Species Act] on . . . approval of State National Pollutant Discharge Elimination (NPDES) permitting programs" but recognizing that after transfer, section 7 will not apply to the state's permitting decisions, the EPA signed a Memorandum of Agreement with the FWS governing the two agencies' involvement with transferred pollution permitting programs. *See* 66 Fed. Reg. 11,202, 11,202, 11,207 (Feb. 22, 2001). Asserting that the "EPA's oversight includes consideration of the impact of permitted discharges on waters and species that depend on those waters," *id.* at 11,215, the Memorandum lists several procedures that the EPA and FWS will establish to ensure that they communicate federal endangered species concerns to state water pollution permitting agencies.[2] *Id.* at 11,216. The Memorandum is not, however, binding on states. *Id.* at 11,206 ("[T]he MOA . . . does not impose any requirements on States."). Rather, the EPA will "*encourage* the State . . . to facilitate the involvement of permittees" in the described processes. *Id.* at 11,216 (emphasis added).

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[2] We discuss these procedures in more detail in Part III(D)(2)(a), *infra*.

C. The EPA's approval of Arizona's pollution permitting transfer application

The State of Arizona (Arizona) applied on January 14, 2002 for transfer of pollution permitting authority regarding Arizona waterways (except those on Indian land). 67 Fed. Reg. 49,916, 49,917 (Aug. 1, 2002). Under that proposal, the Arizona Department of Environmental Quality (ADEQ) was to be responsible for issuing water pollution permits. The EPA's regional office in San Francisco determined that the transfer could affect listed species in Arizona and so initiated formal section 7 consultation with FWS. Announcing this decision, the EPA stated that "[s]ection 7(a)(2) of the [Endangered Species Act] places a statutory requirement (separate and distinct from [33 U.S.C. § 1342(b)]) for EPA to 'insure that any action authorized, funded or carried out[by EPA]'" is unlikely to jeopardize listed species or adversely modify their critical habitat, and that the EPA is therefore "required" to consult regarding the transfer decision. 67 Fed. Reg. at 49,917 (final alteration in original); *see also id.* at 49,919.[3]

[3] The EPA has followed the section 7 consultation process before transferring permitting authority to states for more than a decade. Every pollution permitting transfer decision since 1993 has involved some form of EPA consultation with FWS regarding endangered species. *See* 66 Fed. Reg. 12,791 (Feb. 28, 2001) (Maine); 63 Fed. Reg. 51,164 (Sept. 24, 1998) (Texas); 61 Fed. Reg. 65,047 (Dec. 10, 1996) (Oklahoma); 61 Fed. Reg. 47,932 (Sept. 11, 1996) (Louisiana); 60 Fed. Reg. 25,718 (May 12, 1995) (Florida); 59 Fed. Reg. 1535, 1543 (Jan. 11, 1994) (announcing 1993 approval of South Dakota's application after FWS consultation). Earlier pollution permitting transfer decisions do not appear to have been preceded by Endangered Species Act consultation. *See*, *e.g.*, 52 Fed. Reg. 27,578 (July 22, 1987) (Utah); 51 Fed. Reg. 44,518 (Dec. 10, 1986) (Arkansas); 49 Fed. Reg. 39,063 (Oct. 3, 1984) (Rhode Island); 47 Fed. Reg. 17,331 (Apr. 22, 1982) (New Jersey); 44

During the course of the consultation, FWS field office staff in Arizona expressed serious reservations about the proposed transfer. FWS staff noted that section 7 consultations regarding past pollution permits in Arizona had led to mitigating measures to protect species' critical habitat, and feared that, without such mandatory consultation, Arizona would issue permits without mitigating measures. As a result, there could be harm to certain listed species and habitat, particularly the southwestern willow flycatcher, Pima pineapple cactus, Huachuca water umbel, cactus ferruginous pygmy owl,[4] "and perhaps other species." The staff concluded "that the transfer of this program from EPA to the State causes the loss of protections to species resulting from the section 7 process, and the impact of this loss must be taken into account in the effects analysis in the biological opinion." In response, EPA staff opined that the EPA lacked the legal authority to base its transfer decision on these concerns, because the agency does "not have the legal authority to regulate the non-water-quality-related impacts associated with State NPDES-

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Fed. Reg. 61,452 (Oct. 25, 1979) (Alabama); 39 Fed. Reg. 26,061 (July 16, 1974) (announcing approval of applications from fifteen states in the early years of Clean Water Act operation).

[4] We note that FWS has proposed removing the pygmy owl from the list of threatened and endangered species, although the owl currently remains listed. *See* 70 Fed. Reg. 44,547 (Aug. 3, 2005). Even if the FWS eventually de-lists the pygmy owl, that would not affect our analysis of this case for two reasons. First, we focus on the agency's action based on the record before it, which includes the pygmy owl's listed status. Second, the EPA's action can affect multiple listed species in Arizona, not only the pygmy owl. While we illustrate our analysis with examples of individual listed species, including the pygmy owl, our analysis applies with equal force even if the FWS de-lists any such species.

permitted projects that are of concern to FWS, including the authority to object to such permits based on non-water quality related impacts to listed species."

To resolve this disagreement, staff of the two agencies developed an "Interagency Elevation Document," summarizing their respective opinions. Pursuant to the Memorandum of Agreement, this document transferred authority over the Biological Opinion to the Director of FWS, the Director of the National Marine Fisheries Service, and the Deputy Assistant Administrator of Water at the EPA. *See* 66 Fed. Reg. 11,202, 11,209 (Feb. 22, 2001).

After the consultation at the national level between the EPA and FWS, the Field Supervisor of the Arizona Ecological Services Field Office of the FWS issued a Biological Opinion recommending approval of the transfer of permitting authority to Arizona. Noting the loss of section 7 consultation, the Biological Opinion recognized that, after the transfer, no federal agency would have the legal authority to consult with developers concerning the potential impact on listed species of any pollution permits. Such consultation had lead to measures protecting listed species, including the Pima pineapple cactus, razorback sucker, Gila topminnow, southwestern willow flycatcher, and cactus ferruginous pygmy owl. Although Arizona could voluntarily consult with FWS regarding pollution permits, neither the EPA nor FWS could *require* Arizona to act on behalf of listed species.

After recognizing this impact of the transfer of permitting authority, the Biological Opinion concluded that

> the loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process

that exists with respect to Federal [Clean Water Act] permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

The Biological Opinion goes on to conclude:

While reviewing this above referenced approval, the FWS has spent considerable time analyzing direct and indirect effects. In the course of this analysis, our field office staff biologists have expressed concerns that the approval will result in loss of section 7 consultation-related conservation benefits. We have stated our belief that the loss of section 7 conservation benefits is an indirect effect of the authorization. Furthermore, we have stated that this loss of conservation benefits will appreciably reduce the conservation status of the cactus ferruginous pygmyowl and the Pima pineapple cactus. Notwithstanding this, our final opinion is that the loss of section 7-related conservation benefits, which would otherwise be provided by section 7 consultations, is not an indirect effect of the authorization action.

In changing from a Federal permitting program to a State permitting program, the permit-related section 7 processes for consultation will no longer apply. Essentially, there will be no substantive change in the permit program, but there will be a reduction in the number of mechanisms available to both of our agencies to protect federally-listed species and critical habitat in Arizona. We believe that the assumption of the program by the State of Arizona will not cause development, and concur that

> EPA's [Clean Water Act]-mandated approval of the program has only an attenuated causal link to the reduction in Federal [Endangered Species Act] conservation responsibilities.[5]

As an alternative to this lack-of-causation analysis, the Biological Opinion stated that other federal and state laws would sufficiently protect endangered species, so that transfer of permitting authority would not likely jeopardize such species or their critical habitat. These other laws included section 9 of the Endangered Species Act, 16 U.S.C. § 1538, which outlaws "taking" an endangered species. The Biological Opinion's reliance on this statute contrasted with earlier FWS staff concerns that "section 9 does not generally apply to plant species (such as the Pima pineapple cactus) and it is not effective for extremely rare, but wide-ranging species (such as the cactus ferruginous pygmy-owl). FWS therefore does not believe that section 9 enforcement offsets the effects of approving this program."

Independently of the Biological Opinion, an official at the Arizona Game and Fish Department[6] indicated that his department had "worked cooperatively with ADEQ" when reviewing past water pollution permit applications

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[5] The just-quoted passage mentioned two species in passing in the midst of concluding that any harm to those species was not an indirect effect of the EPA's transfer decision. Elsewhere, the Biological Opinion noted the listed species in Arizona but did not specifically discuss the effect of the transfer on any of these species.

[6] The official, Bob Broscheid, whose title at the Arizona Game and Fish Department is "Project Evaluation Program Supervisor," wrote to an official at the EPA's regional office that would supervise Arizona's permitting decisions. He also carbon copied an ADEQ official. Broscheid's letter describes the Game and Fish Department's understanding of its role but does not purport to speak for ADEQ.

and "look[ed] forward to continuing this level of cooperation between our agencies." Noting the EPA-FWS Memorandum of Agreement, the official asserted that "[t]his agreement will serve as a guideline for EPA, FWS, and the State of Arizona to ensure that NPDES permits will not negatively impact endangered and threatened species." The EPA's response to the Game and Fish Department official's statement was: "EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the application."

FWS staff had earlier suggested the development of a formal memorandum of understanding with ADEQ or the Arizona State Lands Department, but did not mention the Game and Fish Department. No such memorandum of understanding was ever signed, and no official from either ADEQ or the State Lands Department submitted a letter similar to the Game and Fish Department letter.

The EPA approved the permitting authority transfer two days after the FWS issued the Biological Opinion, *see* 67 Fed. Reg. 79,629 (Dec. 30, 2002), noting its belief that the Biological Opinion "appropriately considered all relevant information regarding the effects of the approval." The Arizona Department of Environmental Quality (ADEQ) currently operates the program, issuing permits for water pollution. *See ADEQ: Permits, at* http://www.azdeq.gov/environ/water/permits/index.html (last visited July 5, 2005).

Petitioners, Defenders of Wildlife, the Center for Biological Diversity, and Craig Miller, a resident of Pima County, Arizona (collectively, Defenders) challenge the pollution permitting transfer in two lawsuits,

consolidated before us. In the first, Defenders filed a petition for review of the EPA's transfer decision with this court. The petition alleges that the EPA failed adequately to consider the transfer's impact on endangered and threatened species and their habitat, and, in particular, that the EPA's reliance on the Biological Opinion violated the Endangered Species Act and was arbitrary and capricious under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A). Three other sets of parties have since intervened, supporting the transfer but taking some issue with the EPA's administrative practices and reasoning: the National Association of Home Builders and several Arizona home builders' associations (Home Builders); the Arizona Chamber of Commerce and several other business associations (Chamber); and Arizona.

Defenders also filed an Endangered Species Act and Administrative Procedure Act suit in district court in Arizona alleging, among other claims, that the Biological Opinion supporting the pollution permitting transfer does not comply with Endangered Species Act standards. The district court held that this court has exclusive jurisdiction over the Biological Opinion challenge pursuant to 33 U.S.C. § 1369(b)(1)(D), and ordered that challenge severed from other claims in the district court, transferred to this court, and consolidated with Defenders' suit challenging the EPA transfer.

II. Jurisdiction & Standing

Before proceeding to the merits, we must satisfy ourselves that we have subject-matter jurisdiction over this case and that petitioners have standing to raise their claims. *See B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999). The Chamber contends this

court lacks jurisdiction to hear Defenders' challenge to the Biological Opinion, and the Home Builders maintain that Defenders do not have standing to bring this action. Neither argument is convincing.

A. Subject-Matter Jurisdiction

"[A]ny interested person" may seek judicial *review of* the EPA Administrator's pollution permitting or state transfer decisions in the circuit court in which the person resides, so long as that circuit is directly affected by the Administrator's action. 33 U.S.C. § 1369(b)(1). Section 1369(b)(1)(D) grants this court subject matter jurisdiction to review "any determination as to a State permit program submitted under section 1342(b)." The Chamber argues that §1369(b) authorizes review only of the EPA Administrator's transfer decision, not of a Biological Opinion completed by the FWS that informs that decision.

We disagree. The Supreme Court has noted that biological opinions typically have a "virtually determinative effect" on the ultimate agency action. *Bennett v. Spear*, 520 U.S. 154, 170, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997); *see also id.* at 169, 117 S. Ct. 1154 (noting that a Biological Opinion "in reality . . . has a powerful coercive effect on the action agency" with the potential to "alter[ ] the legal regime to which the action agency is subject"). It would be anomalous to review the ultimate agency "determination" while ignoring the reasoning contained in a biological opinion "virtually determinative" of that action.

The actual sequence of events in this instance in consistent with the Supreme Court's observations in *Bennett* regarding the impact of a biological opinion on an agency's final decision. The EPA Administrator's

decisionmaking process before approving Arizona's permitting transfer application included section 7 consultation with FWS and the consideration of the Biological Opinion that resulted from it: The initial dispute between the EPA and FWS regarding the Biological Opinion was "elevated" to the national level, and the final Biological Opinion incorporated the results of consultation between the EPA and FWS. The final EPA decision, in turn, followed the issuance of the Biological Opinion by two days. In its unpublished Response to Comments regarding Arizona's application to assume permitting authority, released the same day as its final decision, the EPA noted that it had "considered the [biological] opinion of the FWS in proceeding with its approval action." The EPA went on to approve the Biological Opinion's conclusions, stating its determination that "FWS appropriately considered all relevant information regarding the effects of the approval action on listed species and designated and proposed critical habitat in arriving at its conclusion, including a broad range of direct and indirect effects of EPA's approval action," and declaring that "no information has been submitted which would indicate that the conclusions in FWS's biological opinion are incorrect."

The EPA, as part of the statutorily mandated consultation process, approved of and relied upon the Biological Opinion when considering Arizona's transfer application. Evaluating the Opinion's evidentiary and analytic basis is thus integral to reviewing the EPA's final decision.[7]

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[7] The EPA does not argue otherwise. Indeed, the EPA's argument in this court largely replicates the Biological Opinion's reasoning, confirming that the reasoning was a key factor in its decision.

We conclude that we have jurisdiction to consider the adequacy of both the section 7 consultation and the Biological Opinion that resulted from it while reviewing the EPA's final decision.

B. Standing

Petitioners who "allege [1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief" establish Article III standing. *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). As Defenders' members meet this three-part test, Defenders has organizational standing to represent their interests.

Several Defenders' members reside in Arizona and photograph and observe in Arizona various named, listed species—such as the cactus ferruginous pygmy owl, Huachuca water umbel, and the other species noted in Part I.C, *supra*—and hike and camp in these species' various habitats. These members do so regularly and plan to continue doing so in the future, because, among other reasons, these activities bring them recreational, aesthetic, and spiritual fulfillment. The members' activities occur on and near land—such as the upper San Pedro River region, the Sonoran Desert near Saguaro National Park and Tortolita Mountains Park, and the Verde River region—where significant commercial and residential development is taking place, development that depends on water pollution permits. The members assert, consistently with the Biological Opinion, that section 7 consultation has in the past led to mitigation measures by real estate developers in these areas and has thereby protected listed species and their habitat. They further assert that the loss of section 7 consultation would mean that developers of future projects

would not engage in such mitigation measures and that listed species, and the members' interest in their activities involving them, would thereby be harmed.

The members thus "observe[ ] or work[ ] with . . . particular animal[s and plants] threatened by a federal decision," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); allege a harm to those animals and their habitat throughout Arizona; and assert "that [they have] an aesthetic or recreational interest in a particular place, or animal, or plant species . . . impaired by a defendant's conduct." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 182-83, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)); *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109-10 (9th Cir. 2002) (holding that regular "recreation and nature appreciation" on land covered by challenged agency action established injury-in-fact). Those allegations meet the criteria for demonstrating an adequate injury in an environmental case.

The Home Builders argue that alleging harm throughout the state of Arizona cannot establish standing, because the state encompasses too large an area to permit a sufficiently specific injury-in-fact allegation. The Defenders' members who filed declarations, however, mention specific subareas within the state where they engage in activities related to particular listed species and where development is occurring. Our cases require no greater precision. *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1303 (9th Cir. 1993); *see also Kootenai Tribe*, 313 F.3d at 1110 (finding standing where party alleged harm to 58.5 million acres of land). Moreover, in

light of the statewide impact of the EPA's transfer decision, alleging an injury-in-fact covering large areas within the state simply reflects the relatively broad nature of the potential harm.

The alleged injuries are fairly traceable to the EPA's pollution permitting transfer decision. As alleged by Defenders, that decision will remove water pollution permitting decisions from the significant protections provided by section 7.

Finally, the alleged injuries would be redressable by a court order vacating or mitigating the EPA's transfer decision. The protections accorded by the Endangered Species Act would then come back into operation.

Additionally, section 7(a)(2) of the Endangered Species Act contains *both* substantive and procedural requirements, and the plaintiffs in this case have alleged violations of *both* requirements. They thus have alleged, in addition to substantive noncompliance, "procedural" harms, as described in *Lujan* and subsequent cases—here, lack of adequate consultation between the EPA and the FWS, including reliance on a legally improper Biological Opinion.

Reliance on procedural harms alters a plaintiff's burden on the last two prongs of the Article III standing test. See *Lujan*, 504 U.S. at 572 n.7, 112 S. Ct. 2130. To establish standing by alleging procedural harm, the members must show only that they have a procedural right that, if exercised, *could* protect their concrete interests and that those interests fall within the zone of interests protected by the statute at issue. *See Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1015 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004); *Tyler v. Cuomo*, 236 F.3d

1124, 1136 (9th Cir. 2000); *Churchill County v. Babbitt*, 150 F.3d 1072, 1077 (9th Cir. 1998), *amended by* 158 F.3d 491 (9th Cir. 1998).

The members have met these procedural harm requirements. They have, first, established a reasonable probability that the challenged action will threaten their concrete interests. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir. 2003); *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 n.6 (9th Cir. 1995). We held in Citizens for Better Forestry that violating the procedural requirements for forestry decisions meets that bar, as the violation lessens the likelihood that environmental considerations will be attended to in making those decisions. *Id.* at 972-75. Similarly, the use of improper section 7 consultation by reason of an inadequate biological opinion lessens the likelihood that the impact of the proposed action on listed species and their habitats will be recognized and accounted for in making the transfer decision. *See id.* at 972.

An association has standing to sue on behalf of its members who have individual standing if "the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw,* 528 U.S. at 181, 120 S. Ct. 693. The interests at stake—protection of endangered species—plainly relate to Defenders' mission. Nor does this lawsuit require the active involvement of individual members, as the relief sought will run equally to all of them.

Accordingly, we hold that Defenders has standing to challenge the EPA's pollution permitting transfer decision. *See Defenders of Wildlife v. Flowers*, 414 F.3d

1066 (9th Cir. 2005) (holding that Defenders has standing to challenge particular construction permits in Arizona because of "their members' interest" in species that might live where construction would occur).

III. The Merits

A. Standard of Review

Under the Endangered Species Act, each agency has an obligation to "insure" that any action it takes is "not likely to jeopardize" listed species or their critical habitats. *See* § 1536(a)(2);[8] 50 C.F.R. § 402.15(a) (requiring each agency to determine how to proceed "in light of its section 7 obligations and the Service's biological opinion"). Defenders allege that the EPA failed to satisfy

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[8] The relevant portions of section 7(a) of the Endangered Species Act provide:

> (1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.
>
> (2) Each Federal agency *shall*, in consultation with and with the assistance of the Secretary, *insure that any action authorized, funded or carried out* by such agency (hereinafter in this section referred to as an "agency action") *is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical*, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. §§ 1536(a)(1)-(2) (emphasis added).

this obligation and thus acted arbitrarily and capriciously, in violation of the Administrative Procedure Act.[9] *See* 5 U.S.C. § 706(2)(A); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992) (applying § 706(2)(A) arbitrary and capricious review to § 1369(b) petition).

An agency decision will survive arbitrary and capricious review if it is

> rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42-43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (citations omitted). Agency decisions may not, of course, be inconsistent with the governing statute. 5 U.S.C. § 706(2)(A) (instructing courts to "set aside" agency action "not in accordance with law"). Also, internally contradictory agency reasoning renders resulting action "arbitrary and capricious;" such actions are not "'founded on a reasoned evaluation of the relevant factors.'" *Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001) (quot-

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[9] All parties agree that arbitrary and capricious review applies to Defenders' petition for review.

ing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)); *see also Gen.Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (finding agency action "arbitrary and capricious" because it was "internally inconsistent and inadequately explained").

Defenders allege, in particular, that the EPA's reliance on the Biological Opinion was arbitrary and capricious, as the Biological Opinion is itself invalid. *See Res. Ltd.*, 35 F.3d at 1304 (holding that an action agency may not arbitrarily and capriciously rely on a flawed biological opinion); *Pyramid Lake Paiute Tribe v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (same). An agency can satisfy the arbitrary and capricious standard of review, however, even if it relies on an "admittedly weak" Biological Opinion, if there is no "information the Service did not take into account which challenges the [biological] opinion's conclusions." *Id.* at 1415 (*cited in Res. Ltd.*, 35 F.3d at 1304). The upshot is that we must consider whether the EPA, through the Biological Opinion or otherwise, considered all the relevant Endangered Species Act factors and offered an explanation for its decision that is both "plausible" and internally coherent.

Applying this test, we first examine the consistency of the EPA's reasoning. Next, we examine the Biological Opinion, including its legal conclusion regarding the effects of the transfer decision on listed species and their habitat. We then review the other information relied on by the EPA.

B. Coherent reasoning?

As an initial matter, the EPA's approval of Arizona's transfer application cannot survive arbitrary and capricious review because the EPA relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations. Its reasoning was therefore "internally inconsistent and inadequately explained." *Gen.Chem. Corp.*, 817 F.2d at 857.

The EPA definitively stated several times during the decisionmaking process, including when announcing its final decision, that section 7 requires consultation regarding the effect of a permitting transfer on listed species. The agency so stated when announcing its *Memorandum of Agreement with the FWS*, *see* 66 Fed. Reg. 11,202, 11,206 (Feb. 22, 2001); when announcing that it had initiated section 7 consultation regarding Arizona's application because, pursuant to 50 C.F.R. § 402.14(a), approving that application "may affect" listed species, see 67 Fed. Reg. 49,916, 49,917, 49,919 (Aug. 1, 2002); when responding, in an unpublished document, to comments regarding Arizona's application (noting that "[t]here is no doubt" that the pollution permitting transfer "is an action mandating formal consultation under section 7"); and when announcing the approval of Arizona's application. *See* 67 Fed. Reg. 79,629, 79,630 (Dec. 20, 2002) (noting that section 7(a)(2) generally "requires" consultation and that the EPA consulted with FWS "under section 7(a)(2)").

Also, before deciding that consultation was necessary, the EPA first determined that transferring pollution permitting authority to Arizona "may affect" listed species and their critical habitat. *See* 50 C.F.R. § 402.14(a) (requiring consultation when an agency de-

termines its action "may affect" listed species or critical habitat). The EPA, in its unpublished biological evaluation, made this determination in recognition that in the absence of section 7 consultation on each permitting decision, "there will be a reduction in the number of mechanisms available to the [FWS] to protect Federally-listed species and designated critical habitat in Arizona."

Despite the lucidity and consistency of its position on the consultation point in the administrative proceedings, in litigation the EPA's lawyers have taken varying stances on the same issue. Before the Fifth Circuit, the EPA "suggest[ed]" that section 7 compelled consultation regarding pollution permitting transfers and, when necessary to protect species, allowed conditioning such transfers on formal agreements requiring states to follow section 7 procedures when issuing permits. *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998). The Fifth Circuit rejected the latter position and did not address the former. *Id.* at 298 & n.6.

The EPA's brief in this case states that *American Forest* "supports a finding that EPA lacks" authority to protect endangered species when considering pollution permitting approvals. The same brief, however, maintains that we need not decide the question because the agency did not rely on this position in its decision in this case. At oral argument, the EPA declined to take a position as to whether it has an obligation under section 7(a)(2) to consult with FWS with regard to permitting transfer decisions—even though, during the decision-making process, the agency unequivocally stated several times that it does have such an obligation.

The EPA's post-decision equivocation cannot have any impact on our consideration of the validity of the transfer decision. We must review the EPA's actions based on the "grounds . . . upon which the record discloses that its action was based." *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 87, 63 S. Ct. 454, 87 L.Ed. 626 (1943); *see also Gifford Pinchot Task Force v. U.S. FWS*, 378 F.3d 1059, 1072 n.9 (9th Cir. 2004). The record shows unequivocally that the EPA based the action under review in this case on its belief that section 7 required consultation. We must judge its reasoning taking that position into account.

Doing so, we conclude that the obligation to consult —which, under the regulations, applies only to federal agency actions that "may affect" listed species, 50 C.F.R. § 402.14(a)—and the reasons given in the Biological Opinion for concluding that the transfer decision would not have an indirect effect on endangered species cannot coexist under section 7(a)(2). The Biological Opinion reasoned that there could be no such effect, because (1) the EPA has no authority to disapprove transfer applications because of an impact on listed species, section 7(a)(2) of the Endangered Species Act notwithstanding; (2) any impact on the post-transfer protection of listed species was the result of Congress' determination that states have no consultation or mitigation obligations, not of the transfer decision; and (3) the potential future impact on listed species would be caused entirely by new private development, and the transfer decision would not cause such development. By relying on this line of reasoning after determining that it did have a consultation obligation, the EPA decided that it had to consult but had no authority to do anything concerning the matter about which it had to consult. One would not

expect that Congress would set up such a nonsensical regime. Not surprisingly, it did not.

Section 7(a)(2) makes no legal distinction between the trigger for its *requirement* that agencies consult with FWS and the trigger for its *requirement* that agencies shape their actions so as not to jeopardize endangered species.[10] Instead, in one, integrated provision, the statute provides that agencies "shall, in consultation with and with the assistance of the [FWS], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . ." An agency's obligation to consult is thus *in aid of* its obligation to shape its own actions so as not to jeopardize listed species, not independent of it. *Both* the consultation obligation and the obligation to "insure" against jeopardizing listed species are triggered by "any action authorized, funded, or carried out by such agency," and *both* apply if such an "action" is under consideration.

This being the case, the two propositions that underlie the EPA's action—that (1) it must, under the Endangered Species Act, consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a

[10] As described above, section 7 consultation is triggered by a determination that an agency action "may affect" listed species, 50 C.F.R. § 402.14(a), and an obligation to act to mitigate harm to such species is triggered if the FWS determines that the agency action is "likely to jeopardize" listed species or "adverse[ly] modif[y]" their habitat. § 402.14(h). If an agency action *cannot* legally affect listed species—as the Biological Opinion concludes regarding the EPA's approval of Arizona's application—then the "may affect" standard is not met.

matter of law, to take into account the impact on listed species in making the transfer decision—cannot both be true. Because the agency's decisionmaking was based on contradictory views of the same words in the same statutory provision, the ultimate decision was not the result of reasoned decisionmaking.

Additionally, the third prong of the Biological Opinion's reasoning—that it is private development, not the EPA's transfer decision, that would cause any impact on listed species—suffers from an independent lack of plausibility. Events can, of course, have more than one cause. Events can be caused by several actions in a "but-for" causal chain. If any one of the necessary actions does not take place, the ultimate event does not occur. *See*, *e.g.*, *Olympic Airways v. Husain*, 540 U.S. 644, 653, 124 S. Ct. 1221, 157 L. Ed. 2d 1146 (2004) ("[T]here are often multiple interrelated factual events that combine to cause any given injury."). Obviously, without private decisions to construct new developments, there will be no Clean Water Act construction permits and no impact from the issuance of such permits on listed species or their habitats. Just as obviously, without the transfer of permitting authority from the federal to the state government, developers could be required, as they were before the transfer decision, to mitigate any impact from their development on listed species. So the impact of private development will be different depending upon whether the federal or state government does the permitting. In other words, the two sets of decisions *together*—the private development decisions and the governmental transfer decision—but not either one independently, have the potential to affect listed species and their habitat. The Biological Opinion's determination to the contrary disregards the obvious

cause analysis and thus fails the reasoned decision-making standard.

For these reasons, the transfer decision cannot stand. We must remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute.

C. Statutory power to protect species?

Even viewed in isolation, the first explanation for the EPA's no impact conclusion—that the loss of section 7 consultation was not an effect of its transfer decision because the agency had no authority to base its transfer decision on the loss of consultation—fares no better.

Under the statutory regime, the statutory obligation is to "insure" against likely jeopardy of listed species. The two critical factors triggering this obligation are (1) that the "action" be one for which the agency can fairly be ascribed responsibility, namely, an action "authorized, funded or carried out" by the agency; and (2) that there is the requisite nexus to an impact on listed species, namely, a direct or indirect effect "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat]." 16 U.S.C. § 1536(a)(2). There are, consequently, three relevant statutory concepts governing the reach of section 7(a)(2): the nexus to any impact on listed species, the nature of the obligation to "insure" against jeopardizing listed species, and the actions covered.

1. Nexus

The case law indicates that a negative impact on listed species is the likely direct or indirect effect of an agency's action only if the agency has some control over that result. Otherwise, the requisite nexus is absent.

A seminal section 7 indirect effects case, *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), held that the Department of Transportation was responsible for development encouraged by interstate highway construction, because the Department did "control this development to the extent that [it] control[s] the placement of the highway and interchanges." *Id.* at 374. Recently, the Supreme Court in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004) endorsed a similar standard to that used in National Wildlife Federation, albeit under a different statute.

Public Citizen concerned the application of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, regulations to the U.S. Department of Transportation's (DOT) regulations governing safety rules for Mexican trucks traveling on American roads. The NEPA regulations share with the Endangered Species Act regulations a similar definition of "indirect effects." *Compare* 40 C.F.R. § 1508.8(b) ("Indirect effects . . . are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.") *with* 50 C.F.R. § 402.02 ("Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.").

The question in *Public Citizen* was whether DOT was required under NEPA to develop an environmental impact statement with regard to the pollution caused by the entry of Mexican trucks onto United States highways under the North American Free Trade Agreement. The Court held "that where an agency has no *ability to prevent a certain effect due to its limited statutory authority over the relevant actions*, the agency cannot be considered a legally relevant 'cause' of the effect." *Pub. Citizen*, 541 U.S. at 770, 124 S. Ct. 2204 (emphasis added); *see also id.* at 767, 124 S. Ct. 2204 (analogizing "cause" inquiry for purpose of defining "indirect effects" to proximate cause inquiry in tort law).

Given the similarity in the applicable regulations, we adopt the *Public Citizen* standard for purposes of determining the likely effects of agency action under section 7(a)(2) of the Endangered Species Act. Accordingly, deciding whether the Biological Opinion followed Endangered Species Act regulations defining "indirect effects" requires us to determine whether the EPA can consider and act upon the loss of section 7 consultation benefits in deciding whether to transfer pollution permitting authority to Arizona. If so, then the EPA's transfer decision can be a cause of the loss of section 7 consultation benefits; the loss of those benefits should have been included in the Biological Opinion as an indirect effect of the potential transfer decision; and the loss of those benefits should have been considered and acted upon by the EPA.

2. *"Insure that any action . . . is not likely to jeopardize the continued existence of any [listed] species"*

Authority over the loss of section 7(a)(2) consultation could be grounded in either the Clean Water Act or the Endangered Species Act. The former option is not presented here,[11] so we focus on whether the obligation in section 7(a)(2) to "insure" against jeopardizing listed species empowers the EPA to make decisions to preserve listed species and their habitat even if the Clean Water Act does not so specify. If so, then the EPA has the authority—indeed, because section 7(a)(2) speaks in mandatory terms, the duty—to deny a pollution permitting transfer application that meets Clean Water Act standards but would jeopardize protected species.

The language in section 7(a)(2) providing that each federal agency "shall . . . insure that any action authorized, funded or carried out by such agency"[12] will not jeopardize listed species or their critical habitat is addressed to each agency, without exception. Our question is: what does it require each agency to do?

The ordinary meaning of "insure" as used in this context requires agencies to take action, as dictionary definitions make clear. To "insure" is "[t]o make (a person) sure (of a thing)" and ("[t]o make certain, to secure, to guarantee (some thing, event, etc.)").[13] VII THE OX-

[11] No party questioned the EPA's determination that Arizona's transfer application met the Clean Water Act factors. *Cf. Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 298 (5th Cir. 1998) ("EPA's discretion lies . . . in ensuring that those [§ 1342(b)] criteria are met.").

[12] We refer to such actions as "agency actions."

[13] This definition is consistent with those in dictionaries in print at the time Congress enacted the Endangered Species Act in 1973. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE

FORD ENGLISH DICTIONARY 1059 (2d ed. 1989) (emphasis removed). Unless an agency has the authority to take measures necessary to prevent harm to endangered species, it is impossible for that agency to "make certain" that its actions are not likely to jeopardize those species. Otherwise, agencies would be forced to choose between violating section 7's prohibition on agency actions that are likely to jeopardize listed species and acting beyond their powers to protect such species.

The Supreme Court's seminal section 7 case, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978), confirms this textual interpretation:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words *affirmatively* command all federal agencies 'to *insure* that actions *authorized*, *funded*, or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species. . . .' This language admits of no exception.

466, 731 (2d College Ed. 1972) (defining "insure" as "same as ensure," which is defined as "to make sure or certain; guarantee; secure"). "Insure" has multiple definitions, but the alternatives are inapposite to section 7(a)(2). They include "to pledge one's credit," "to engage by pledge or contract," and "to secure the payment of a sum of money in the event of loss." THE OXFORD ENGLISH DICTIONARY 1059 (2d ed. 1989).

437 U.S. at 173, 98 S. Ct. 2279 (first alteration added, other alterations in original) (citation omitted).[14] An "affirmative command" by a superior authority—here, Congress—ordinarily carries with it both the obligation and the authority to obey that command. For example, despite policy arguments in favor of continuing construction of the dam, the Court in *Hill* relied on Congress's use of "the plainest of words" and section 7's equally plain legislative history, *id.* at 194, 98 S. Ct. 2279, to hold that further construction was in "irreconcilable conflict" with section 7. *Id.* at 193, 98 S. Ct. 2279; *see also id.* at 184, 98 S. Ct. 2279 ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

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[14] The Chamber refers to a case of this court as purportedly limiting *Hill*, *National Wildlife Federation v. Burlington Northern Railroad, Inc.*, 23 F.3d 1508 (9th Cir. 1994). This court cannot, of course, limit any holding of the Supreme Court; only the Court or, for statutory cases, Congress may do that. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

Further, *National Wildlife Federation* was not a case concerning a federal action, and therefore did not raise any section 7(a)(2) issue. Moreover *National Wildlife Federation* merely supports the obvious proposition that a preliminary injunction is an equitable remedy and a court need not grant an injunction "for every violation of law." 23 F.3d at 1512.

Finally, far from abandoning the statutory interpretation in *Hill*, the Supreme Court has since *National Wildlife Federation* relied on and quoted *Hill* in reiterating the conclusion that "Congress[ ] inten[ded] to provide comprehensive protection for endangered and threatened species." *See Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 699, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995).

Hill's analysis of the legislative history of the Endangered Species Act confirms that the authority conferred on agencies to protect listed species goes beyond that conferred by agencies' own governing statutes. *Hill* noted that earlier endangered species legislation, as well as earlier versions of the bills that became the present Endangered Species Act, included the qualifier "insofar as is practicable and consistent with [an agency's] primary purpose." *See* Pub. L. 89-669 § 1(b), 80 Stat. 926 (1966); *Hill*, 437 U.S. at 181 & n.26, 98 S. Ct. 2279. The final version of the statute "carefully omitted [those] reservations," *id.* at 182, 98 S. Ct. 2279, and replaced them with the universal terms of section 7. The "pointed omission" of such qualifications amounted to an "explicit congressional decision to require agencies to afford *first priority* to the declared national policy of saving endangered species." *Id.* at 185, 98 S. Ct. 2279 (emphasis added); *see also id.* at 174, 98 S. Ct. 2279 ("Congress intended endangered species to be afforded the highest of priorities.") (quoted in *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1033 (9th Cir. 2005)).

Another aspect of the statute's structure and history, not directly at issue in *Hill,* bolsters the conclusion that section 7 includes an affirmative grant of authority to attend to protection of listed species within agencies' authority when they take actions covered by section 7(a)(2). Section 7(a)(1) of the Endangered Species Act directs agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed] species." 16 U.S.C. § 1536(a)(1). Section 7(a)(2), in contrast, does not refer to agencies' existing "authorities," but instead directs agencies that, when considering covered "actions,"

they are to proceed in a manner not likely to jeopardize listed species.

The House Report indicates that this distinction between the two sections was, as one would expect, deliberate. The Report noted the requirement of present section 7(a)(2) as imposing a "*further require[ment]*" beyond that of section 7(a)(1).[15] *See* H.R. Rep. No. 93-412, at 14 (1973), *reprinted in* 1 CONGRESSIONAL RESEARCH SERVICE, A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 153 (1982) [hereinafter LEGISLATIVE HISTORY] (emphasis added). The contrasting language of the two sections indicates that the "further requirement" imposed by section 7(a)(2) turns on the distinction between using *existing* authority to promote conservation of species and conferring an *additional*, do-no-harm obligation—and reciprocal authority—applicable when the agency's *own* actions could cause harm to endangered species.

That Congress so provided is confirmed by Representative Dingell's statement concerning the final bill, relied upon by the Supreme Court as an authoritative statement of section 7's intent:[16] "'[T]he agencies of Government can no longer plead that they can do nothing about [harm to threatened or endangered species]. *They can, and they must. The law is clear.*'"

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[15] This history is consistent with the "canon of statutory interpretation which holds that terms of the same statute are not to be construed so as to be redundant." *Agredano v. Mutual of Omaha Cos.*, 75 F.3d 541, 544 (9th Cir. 1996).

[16] Representative Dingell was the House manager of the Endangered Species Act. *Hill*, 437 U.S. at 183, 98 S. Ct. 2279.

Hill, 437 U.S. at 184, 98 S. Ct. 2279 (quoting 119 Cong. Rec. 42913 (1973), emphasis in *Hill*).[17]

After the Supreme Court decided *Hill* in 1978, Congress amended the Endangered Species Act, creating a narrow exception to section 7's requirements. See Pub. L. No. 95-632, 92 Stat. 3751 (1978). The 1978 amendment did not change section 7's substantive provisions. Instead, Congress created a process by which agencies could apply to an "Endangered Species Committee" for exemptions, § 1536(g), and specified standards by which to judge such applications, § 1536(h). The Senate Report described this exemption as a direct response to *Hill*, stating that *Hill* represented "the type of Federal action which should be eligible for review" for a section 7(g) exemption. S. Rep. No. 95-874, at 2 (1978), *reprinted in* 3 LEGISLATIVE HISTORY, at 940.

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[17] Another portion of Dingell's same statement was quoted in an earlier case of this court, *County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081 (9th Cir. 2003), to support the proposition that "[t]here is authority that the [Endangered Species Act] does not grant powers to federal agencies they do not otherwise have." *Id.* at 1085 (citing Hill, 437 U.S. at 183, 98 S. Ct. 2279). The portion of Dingell's statement quoted in *Okanogan* was also quoted in *Hill*, but it is not the Supreme Court's own language. Much more of Dingell's same statement, including the language we quote in the text, appears as well in *Hill*.

To say that "there is authority" regarding a proposition is not to state a holding of this court. There is, as we judges are well aware in our daily work, often conflicting "authority" for any proposition. *Okanogan* had no need to survey, as we do today, all the relevant authority, as it went on to decide the case before it on independent grounds. Because the *Okanogan* panel rested its opinion on other points, it did not decide the question now before us.

The limited exemption created by the 1978 amendments and contained in sections 7(g) and (h) has no direct application here, as the EPA did not apply for it. Its terms, however, serve to confirm that the interpretation of the "insure" requirement in *Hill* remains controlling.

Sections 7(g) and (h) focus on practical concerns, not legal constraints on agency power to protect species. To obtain an exemption, an agency must show that "there are no reasonable and prudent alternatives to the agency action," the benefits of the action "clearly outweigh the benefits of alternative course of action consistent with conserving the species or its critical habitat, and such action is in the public interest," and the action has regional or national significance. § 1536(h)(1)(A)(i)-(iii). Critically, no section 7(g) exemption may be granted until *after* consultation is completed. § 1536(g)(1); 50 C.F.R. § 402.15(c). Thus, at the time consultation occurs, all parties must operate under the assumption that all of section 7(a)(2)'s substantive requirements apply to the action agency. The net effect of the section 7(g) and (h) exemption, then, is to leave the consultation requirement in effect as it was previously; to leave in place the kinds of "agency actions" to which the section 7(a)(2) requirement applies; but to provide a set of procedures and substantive standards for limiting in some circumstances the mandate that agencies "insure" that their actions are not likely to jeopardize listed species.

That the 1978 amendments reiterated rather than retreated from *Hill's* underlying understanding of the Endangered Species Act is confirmed by the history of those amendments. The House Report summarized Congress's understanding of *Hill's* conclusion that "[t]he

pointed omission of any type of qualifying language in the statute revealed congressional intent to give the *continued existence of endangered species priority over the primary missions of federal agencies*." H.R. Rep. No. 95-1625, 10 (1978), *reprinted in* 2 LEGISLATIVE HISTORY, at 734 (emphasis added). Congress did nothing to alter this conclusion. Instead, in enacting the 1978 amendments, Congress once again refused to adopt an amendment that would have limited section 7 compliance to situations when compliance is "practicable and consistent with [agencies'] primary responsibilities." S. Rep. No. 95-874, at 58-59 (1978), 3 LEGISLATIVE HISTORY at 996-97. Congress's rejection of this amendment underlines its continued understanding, consistent with *Hill*, that section 7(a)(2) specifies that agencies must *when acting affirmatively* refrain from jeopardizing listed species, even if the agency's governing statute does not so provide. The only exception to this rule lies in a section 7(g) exemption.

We conclude that the obligation of each agency to "insure" that its covered actions are not likely to jeopardize listed species is an obligation in addition to those created by the agencies' own governing statute. The next question we must decide is whether the EPA's transfer decision is the kind of agency action to which that obligation applies.

3. Actions "authorized, funded, or carried out" by an agency

As we interpret section 7(a)(2) in light of the case law, the Endangered Species Act confers authority and responsibility on agencies to protect listed species when the agency engages in an affirmative action that is both within its decisionmaking authority and unconstrained by

earlier agency commitments. The decision to approve a state's pollution permitting transfer application meets these criteria and is thus the sort of decision to which section 7(a)(2) applies. The Biological Opinion's reasoning that the EPA had no choice but to disregard the impact of the transfer on listed species in Arizona was therefore inconsistent with the statute.

Section 7(a)(2) applies to all agency actions "authorized, funded, or carried out" by the agency in question. This language does indicate that some agency actions are not covered—those the agency does *not* "authorize[ ], fund[ ], or carr[y] out." Our determination as to whether the transfer decision is covered thus depends on the meaning of those terms.[18]

The regulatory provision that delineates the actions covered by section 7(a)(2) reads: "Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Although there is no statutory reference to "discretionary involvement or control," there is the limitation, just noted, to actions "authorized, funded, or carried out" by the agency. As that limiting language is the only possible source for the regulation's "discretionary" qualification of "all actions," we take the regulation as a gloss on what the statutory limitation means and interpret the term "discretionary" accordingly.

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[18] Because we conclude that approving Arizona's application is an "authorizing" action, and because no party argued that the EPA's use of some other authority—such as its grant-making authority, *see* 33 U.S.C. § 1256, which helped Arizona implement the pollution permitting program—we do not decide whether any action besides the transfer decision triggered section 7(a)(2).

Arizona and the Chamber note that the Clean Water Act specifies that the EPA "shall approve" state applications that meet certain enumerated factors. 33 U.S.C. § 1342(b). They argue that this language precludes EPA "discretion" to act on behalf of listed species, and that, applying 50 C.F.R. § 402.03, section 7 does not apply. However, "an agency cannot escape its obligation to comply with the [Endangered Species Act] merely because it is bound to comply with another statute that has consistent, complementary objectives." *Wash. Toxics*, 413 F.3d at 1032. Applying this principle, we reject, for two reasons, Arizona and the Chamber's argument that § 1342(b) of the Clean Water Act eliminates any obligation to follow section 7(a)(2) of the Endangered Species Act.

First, the EPA makes no argument that its transfer decision was not a "discretionary" one within the meaning of 50 C.F.R. § 402.03. Indeed, it could not so argue for, as we have seen, the agency recognizes that it had a duty to consult, a duty the regulations would preclude if the federal involvement in or control of the transfer decision was not sufficiently "discretionary." We may not affirm the EPA's transfer decision on grounds not relied upon by the agency. *See Chenery I*, 318 U.S. at 87, 63 S. Ct. 454; *see also Gifford Pinchot Task Force*, 378 F.3d at 1072 n.9. Further, we ordinarily defer to an agency's interpretation of its own regulation. *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220, 121 S. Ct. 1433, 149 L. Ed. 2d 401 (2001). As the EPA evidently does not regard § 402.03 as excluding the transfer decision, we should not so interpret the regulations.

Second, cases applying § 402.03 are consistent with our understanding that the regulation's reference to "discretionary . . . involvement" is congruent with the statutory reference to actions "authorized, funded, or carried out" by the agency. Put another way, imposing section 7(a)(2)'s substantive requirements in those cases would have gone beyond the limited command of the statute.

Our § 402.03 "discretionary . . . involvement or control" cases hold section 7(a)(2) inapplicable if the agency in question had "no ongoing regulatory authority" and thus was not an entity responsible for decisionmaking with respect to the particular action in question. *Wash. Toxics*, 413 F.3d at 1033. For example, we have relied on the "discretionary . . . involvement" regulation to find section 7(a)(2) inapplicable where the agency lacked any decisionmaking authority over the action of the kind challenged. *See Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (holding that the action at issue fell outside the agency's authority because the risk of harm to listed species arose from the President's decision regarding the Navy's nuclear submarine force, not the Navy's obedience to that order); *see also Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) (holding section 7(a)(2) inapplicable where a different agency made the ultimate decisions, while the respondent agency "merely provided advice," without authorizing, funding or carrying out anything). Other cases have found section 7(a)(2) inapplicable where the challenged action was legally foreordained by an earlier decision, such as where the agency lacked the ability to amend an already-issued permit "to address the needs of endangered or threatened species." *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d

1073, 1082 (9th Cir. 2001) (cited in *Wash. Toxics*, 413 F.3d at 1032) (applying § 402.16, which has similar language to § 402.03); *see also Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (cited in *Wash. Toxics*, 413 F.3d at 1032) (holding that section 7(a)(2) did not apply because the agency had no "[ ]ability to influence" a project based on a right-of-way granted prior to the Endangered Species Act's enactment).

In contrast, we have held that section 7(a)(2) does apply where the agency in question had continuing decisionmaking authority over the challenged action. *See Wash. Toxics*, 413 F.3d at 1032 (holding that section 7(a)(2) applies to the EPA's registration of pesticides because of its "ongoing discretion to register pesticides, alter pesticide registrations, and cancel pesticide registrations"); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969 (9th Cir. 2003) (holding that section 7(a)(2) applies to the granting of permits—a quintessential "authorizing" action—for future fishing); *see also Sierra Club*, 65 F.3d at 1508 (citing *O'Neill v. United States*, 50 F.3d 677, 680-81 (9th Cir. 1995), and noting that section 7 applies to already-approved projects "if the project's implementation depended on an additional agency action"); *Envtl. Prot. Info. Ctr.*, 255 F.3d at 1082; *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (holding that section 7(a)(2) applies to "renewal of water contracts" because the agency had power to set the terms of—that is, to "authorize"—the renewed contracts, and was not bound to reaffirm merely the previously-negotiated terms); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994) (holding that section 7(a)(2) did apply when there was "ongoing agency action" in that the

agency retained power to authorize and carry out land use decisions).

In sum, we understand our cases applying the "discretionary . . . involvement" regulation to interpret that regulation to be coterminous with the statutory phrase limiting section 7(a)(2)'s application to those cases "authorized, funded, or carried out" by a federal agency. Where a challenged action has not been "authorized, funded, or carried out" by the defendant agency, we have held that section 7(a)(2) does not apply. Where the challenged action comes within the agency's decisionmaking authority and remains so, it falls within section 7(a)(2)'s scope.[19]

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[19] The dissent concludes that because the Clean Water Act requires the EPA to consider a list of nine requirements when evaluating a state's pollution permitting transfer application, the EPA had no discretion to reject Arizona's application on Endangered Species Act grounds. The EPA has repeatedly taken the position that the question whether the EPA has sufficient discretion, applying 50 C.F.R. § 402.03, under the Endangered Species Act is not before us and has twice asked us to remand any question concerning such discretion. *See* EPA CR 28(j) letter of July 27, 2005 ("EPA did consult. The only issue before this Court is the adequacy of that consultation. For the same reason, the Court should not reach the question regarding whether the EPA has sufficient discretion to trigger consultation regarding the approval of the transfer of 402 permitting authority to the State."); EPA CR 28(j) letter of Aug. 4, 2005 ("Respondents again emphasize that the issue of whether or not the [EPA] can properly rely on 50 C.F.R. § 402.03 in deciding whether or not it must consult regarding its approval of the State of Arizona's Clean Water Act 402 Permitting Program is not before the Court in this case because EPA did consult regarding the approval of the program."). As noted in Part III.B, *supra*, the EPA has taken contradictory positions regarding its section 7(a)(2) obligations. The dissent does not explain its disagreement with that portion of our opinion.

The dissent argues that we should nonetheless affirm the EPA's

Like the agencies in *Washington Toxics*, *Pacific Rivers* and *Houston* but not the other § 402.03 cases noted above, the EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application. The EPA's decision authorized the transfer, thus triggering section 7(a)(2)'s consultation and action requirements.

4. Other Circuits

Although *Washington Toxics* and the cases are fully consistent with our analysis, this case is the first in which we have specifically addressed the question whether section 7(a)(2) of the Endangered Species Act provides a modicum of additional authority to agencies, beyond that conferred by their governing statutes, to protect listed species from the impact of affirmative federal actions. Other circuits, however, have considered the question. The reasoning of those opinions reflects an existing intercircuit conflict on the question before us, with two circuits reading section 7(a)(2) as we do and two concluding that section 7 does not itself authorize agencies to protect listed species even when it is their own action that is jeopardizing then. *Compare Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1299 (8th Cir. 1989), *and Conservation Law Found. v. Andrus*, 623

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action based on § 402.03 because the question is one of statutory interpretation. But that is simply not so; § 402.03 is a regulation, *not* a statute. The dissent offers no analysis of the key *statutory* provision, section 7(a)(2) of the Endangered Species Act, nor does it offer any response to our interpretation of the plain language, intent and history of that section. Although the dissent does offer an interpretation of the Clean Water Act, that interpretation only matters if we are wrong about section 7(a)(2) of the Endangered Species Act and the EPA was wrong under 50 C.F.R. § 402.03 in consulting about the transfer of permitting authority.

F.2d 712, 715 (1st Cir. 1979) *with Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 294, 298-99 (5th Cir. 1998), *and Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992). We do not find the D.C. Circuit and Fifth Circuit cases persuasive, as they do not reflect a full consideration of the text and history of section 7(a)(2).

The First Circuit, writing a year after the Supreme Court decided *Hill,* noted that the Endangered Species Act "will continue to apply of its own force to major actions taken by the [agency]," regardless of the contents of the specific statute under which the agency acted. *Conservation Law Found.*, 623 F.2d at 715. Thus, although the governing statute in that case may have contained standards "less stringent than those of the [Endangered Species Act]" with regard to the protection of listed species, "[t]he [Endangered Species Act] by its terms applies to all action by the Secretary." *Id.* Consequently, "[i]f [the secretary] cannot . . . insure that exploration will not jeopardize the continued existence of [listed species], he will not approve exploration plans." *Id.*

A decade later, the Eighth Circuit echoed *Conservation Law Foundation,* writing that "[e]ven though a federal agency may be acting under a different statute, that agency must still comply with the [Endangered Species Act]." *Defenders of Wildlife*, 882 F.2d at 1299; John W. Steiger, *The Consultation Provision of Section 7(a)(2) of the Endangered Species Act and Its Application to Delegable Federal Programs*, 21 ECOLOGY L.Q. 243, 274 (1994) (describing as "well established" the proposition that "section 7(a)(2) provides an independent source of

authority that is in addition to the authority the Agency is granted in its programmatic statutes").

The D.C. Circuit has indicated that the Endangered Species Act does not empower an agency to impose conditions on an interim, annual license that, unlike the pollution permitting transfer decisions at issue here, the agency was obliged to issue without any deliberation. In so concluding, the D.C. Circuit noted in passing the language of section 7(a)(2), but reasoned that section 7(a)(1) instructs agencies to "utilize their authorities," and that this section 7(a)(1) language "does not *expand* the powers conferred on an agency by its enabling act." *Platte River*, 962 F.2d at 34 (emphasis in original).

Platte River did not recognize the obvious differences between section 7(a)(1) and 7(a)(2) in both language and purpose. The D.C. Circuit did not, for example, discuss at all the meaning of the term "insure" in section 7(a)(2), absent from section 7(a)(1). Nor did it notice the difference between affirmative agency attempts to protect listed species (section 7(a)(1)) and a do-no-harm directive pertaining to affirmative agency actions with likely adverse impact on listed species (section 7(a)(2)). Finally, the D.C. Circuit in *Platte River* did not mention the availability of exemptions from section 7(a)(2) under the 1978 amendments, or the repeated decision of Congress not to approve proposed amendments that would have limited the reach of section 7(a)(2) so as to accord with the D.C. Circuit's reading of the unamended statute. For all these reasons, we do not find *Platte River*'s cursory consideration of the question persuasive.

The Fifth Circuit relied on *Platte River* to hold that section 7(a)(2) does not permit the EPA to require a state to consult with FWS before issuing a water pollution per-

mit. *Am. Forest & Paper Ass'n*, 137 F.3d at 294, 298-99. While we do not pass on the precise question decided in *American Forest*, we do note that, aside from the deficiencies of *Platte River* on which the Fifth Circuit relied, *American Forest* rested on a fundamental misconception concerning section 7(a)(2): The Fifth Circuit stated that it is "largely beside the point" whether the EPA's transfer decision is an "agency action," because "[e]ven if EPA were required to consult with the agencies . . . EPA lacks authority to" require states to protect listed species. *Id.* at 298 n.6. Section 7(a)(2), however, specifies that *if* an agency is contemplating a covered "agency action," it has an obligation *both* to consult and to "insure" against taking action likely to jeopardize species. The Fifth Circuit's notion that the consultation and assurance aspects of the statute are independent is simply incorrect.

In sum, the better reasoned out-of-circuit authority, as well as our own precedent, supports our conclusion that section 7(a)(2) independently empowers EPA to make pollution permitting transfer decisions on behalf of listed species and their habitat when undertaking covered actions.

5. Summary

We hold that approving Arizona's pollution permitting transfer application was an agency action "authorized" by the EPA, thus triggering both section 7(a)(2)'s consultation requirement and its mandate that agencies not affirmatively take actions that are likely to jeopardize listed species. The EPA may have complied with its obligations under the Clean Water Act, but compliance with a "complementary" statute cannot relieve the EPA of its independent obligations under section 7(a)(2). *See Wash.*

Toxics, 413 F.3d at 1033. Section 7(a)(2) imposes a duty on the EPA to "insure" its transfer decision is not likely to jeopardize protected species or adversely modify their habitat, and this duty exists alongside Clean Water Act provisions as the agency's "first priority." *Hill*, 437 U.S. at 185, 98 S. Ct. 2279.

We therefore conclude that, under *Public Citizen,* the EPA's transfer decision will cause whatever harm may flow from the loss of section 7 consultation on the many projects subject to a water pollution permit, and that harm constitutes an indirect effect of the transfer.[20] The Biological Opinion, which ignored this effect while recognizing that section 7 consultations concerning pollution permitting permits have saved species' critical habitat in the past, was therefore deficient. The EPA erred by relying on this fatally deficient Biological Opinion.

D. *Other bases for the EPA's transfer decision*

Having concluded that the Biological Opinion upon which the EPA relied was flawed in its basic legal premise,[21] we now consider whether that Opinion's other analyses, or any analysis outside the Biological Opinion that the EPA relied upon, saves the validity of the EPA's transfer decision.

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[20] Defenders also challenge the Biological Opinion and the EPA for failing to analyze the "cumulative effects" of the pollution permitting transfer, as required by Endangered Species Act regulations. *See* 50 C.F.R. § 402.14(g)(3) (requiring consideration of "cumulative effects"); § 402.02 (defining "cumulative effects"). As we consider the loss of section 7 consultation benefits on future permits an "indirect effect" of the EPA's transfer decision, we need not consider Defenders' argument that the EPA and Biological Opinion should have also considered that effect as part of a "cumulative effect."

[21] *See supra*, Parts III(B)-(C).

1. No "detailed discussion" of effects on all listed species

Consistent with its underlying legal analysis, the Biological Opinion never considered in any detail the likely real-world impact of the transfer decision on listed species in Arizona. The failure to conduct that inquiry fatally infects the Opinion's truncated alternative causation analysis.

50 C.F.R. § 402.14(h)(2) requires a biological opinion to include a "detailed discussion of the effects of the action on listed species or critical habitat." The Biological Opinion on which the EPA relies does not do so. Instead, it refers to a website summarizing listed species' *status,* but includes no discussion of how the pollution permitting transfer might affect any particular species. The Biological Opinion concludes that the transfer will not likely jeopardize *any* species—but only because, once again, "it is not the proposed action itself that is jeopardizing these species."

Defending the Biological Opinion, the Home Builders argue that the "effects of the action"—which the Biological Opinion must consider under 50 C.F.R. § 402.14(h)—exclude the impact of Arizona water pollution permits on terrestrial species.[22] Neither the Biological Opinion nor

[22] The record indicates that a large portion of permits issued by ADEQ—up to 20,000 permits annually—will be for "stormwater construction [discharges]." This reference is to storm water that flows over a construction site, picking up various pollutants and carrying them across terrestrial and eventually into aquatic habitat. *Stormwater Discharges from Construction Activities,* EPA-NPDES, *at* http://*cfpub1.epa.gov/npdes/stormwater/const.cfm?program—id=6* (last visited July 5, 2005). Such permits relate to the construction itself, not to a discrete discharge during construction. As a practical matter, a developer could not perform any construction activities without such a permit.

the EPA, however, used this argument to support the agency action. We may not affirm the EPA's transfer decision on grounds not relied upon by the agency. *See Chenery I*, 318 U.S. at 87, 63 S. Ct. 454; *see also Gifford Pinchot Task Force*, 378 F.3d at 1072 n.9. Accordingly, we need not decide the merits of the Home Builders' argument.

It is understandable that EPA has not embraced the Home Builders' analysis. According to the Home Builders, the section 7 consultations and EPA-requested mitigation undertaken in the past regarding *federal* pollution permits were improper, because the EPA took into account as indirect effects the long-run impact of development on terrestrial upland species. This argument is based on a flawed reading of Endangered Species Act regulations.

A Biological Opinion must discuss the effects of an agency action, § 402.14(h), including the action's direct effects, indirect effects, and "effects of other activities that are interrelated or interdependent with that action," meaning those actions "that are a part of a larger action and depend on the larger action." § 402.02. If a construction project cannot go forward without a water pollution permit, then the entire project is "interrelated or interdependent" with the proposed discharge and must be considered in a Biological Opinion.

The Home Builders cite a different regulation, requiring a more limited analysis. *See* § 402.12(c), (d)(2) (describing requirements of a biological assessment to include only discussion of effects on listed species and habitat in the "action area"). But that limited analysis applies to what an action agency must do *before* formal section 7 consultation begins, and does not excuse agencies

from other section 7 requirements that consultation may trigger.

The Home Builders also cite cases relating to portions of development projects that "could exist independently of each other." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116 (9th Cir. 2000). Seemingly, the Home Builders argue that, because section 7 does not require consultation or mitigation with regard to a development project truly independent of the one covered by a permit, section 7 also does not cover development projects that *are* dependent on the permit in question. On the contrary, section 7 covers development projects "interrelated or interdependent with" the discharge permitted by a permit, and therefore covers in many instances the development that will take place if construction-connected stormwater discharge is permitted.

Neither the FWS nor the EPA makes any argument that justifies the Biological Opinion's failure to analyze, in detail, the likely effect of such future development projects fostered by pollution permits on specific species. This failure is especially telling in light of the benefits of section 7 consultation regarding water pollution permits. That consultation, as the Biological Opinion noted, has led various developers to alter their development plans, preserving thousands of acres of listed species' habitat. For example, such mitigation has "maintain[ed] dispersal and movement corridors" for the pygmy owl. FWS staff had noted that the absence of section 7 consultation could harm specific species, yet the Biological Opinion did not spell out those concerns in any detail.

By not considering the transfer's specific impact on listed species—at least those as to which specific con-

cerns had been expressed—the Biological Opinion "failed to consider an important aspect" of the transfer decision. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

2. Alternatives to section 7 consultation

The Biological Opinion notes state and federal endangered species protections that exist without section 7 consultation, including: (1) the Memorandum of Agreement between the EPA and FWS, EPA oversight over ADEQ; (2) the Endangered Species Act's anti-take provisions; and (3) Arizona state law. The EPA relies on these protections as sufficient to assure against jeopardizing listed species. None of these protections, however, are sufficient substitutes for section 7's consultation and mitigation mandates.

a. Memorandum of Agreement

The Memorandum of Agreement provides the closest substitute for the provisions of section 7. It cannot, however, replace section 7, because it does not grant the federal government any authority to require Arizona to engage in the kind of consultation and mitigation measures EPA had conducted before the transfer.

Under the Memorandum, the EPA will review ADEQ permits and identify those that "may raise issues regarding" listed species. 66 Fed. Reg. 11,202, 11,216 (Feb. 22, 2001). For projects posing a significant threat to listed species, the FWS "will work with the State . . . to reduce the detrimental effects stemming from the permit." *Id.* The FWS, however, has no statutory authority to mandate that the state revise any problematic permits, nor does the EPA. In contrast, all federal agencies have

a duty, in consultation with the FWS, to ensure that their actions are not likely to jeopardize any listed species or their designated habitat. § 1536(a)(2).

The Memorandum also provides that the "EPA will use the full extent of its CWA [Clean Water Act] authority to object to a State . . . permit where EPA finds . . . that a State . . . permit is likely to jeopardize" listed species. 66 Fed. Reg. at 11,216. However, the Clean Water Act does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of all endangered species; the EPA has that authority only when one also considers the Endangered Species Act.[23] As a result, Endangered Species Act concerns raised by a permit are cognizable under the Clean Water Act only fortuitously, if at all. Unless the EPA is willing to use the authority granted by section 7 in addition to that accorded by the Clean Water Act, the EPA's ability to object to permits and thereby conserve listed species will be quite limited.

In sum, the Memorandum calls for the EPA and the FWS to *discuss* listed species matters with ADEQ, but relies on ADEQ *voluntarily* to cooperate with those federal agencies. We assume that ADEQ will consider any listed species issues raised in good faith. Nothing in the record, however, indicates that ADEQ even has authority under state law to *require* permit applicants to protect

[23] Pollution permitting standards that apply to both federal permits, 33 U.S.C. § 1342(a), and state permits, § 1342(b)(1)(A), incorporate concerns for the effect of pollutants on *aquatic* species living in waterways affected by water pollution. *See, e.g.*, 33 U.S.C. § 1317(a)(1) (listing effect of toxic pollutants on "affected organisms in any waters" as a factor to consider in issuing permit). These powers do not extend to terrestrial species, nor do they include section 7(a)(2)'s *prohibition* on agency actions that are likely to jeopardize listed species.

listed species. Section 7 thus provides protection for species that reliance on purely voluntary action by the state cannot supply.

b. EPA oversight

For similar reasons, EPA oversight under 33 U.S.C. § 1342(c) provides a weak substitute for section 7 consultation. Such oversight relates to different substantive standards—those of the Clean Water Act, rather than the Endangered Species Act. The Clean Water Act standards governing permitting decisions will not directly relate to protection of most—if any—listed species, and so cannot substitute for section 7 coverage.

c. Endangered Species Act anti-take provisions

The Endangered Species Act makes it a crime to "take" any species listed as endangered, defining "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1538(a); 16 U.S.C. § 1532(19). The Supreme Court has upheld regulations that define "take" to include any act "which actually kills or injures wildlife," where such acts may include "significant . . . modification or degradation" of listed species' habitat.[24] *See Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 691, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995) (upholding 50 C.F.R. § 17.3). Section 10 of the

[24] The regulation defines "[h]arm in the definition of 'take' in the Act [as] an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

Endangered Species Act creates an "incidental take" permit program pursuant to which the Secretary of Interior may grant permits for activity—such as some construction projects—that may incidentally "take" an endangered species specimen, so long as the permittee sufficiently mitigates the risk of a take. *See* 16 U.S.C. § 1539. These anti-take provisions apply to all actors, not only the federal government. § 1538(a)(1). Accordingly, private developers are subject to sections 9 and 10 regardless of whether the EPA or a state government issues the developers' water pollution permits.

Sections 9 and 10 are important provisions, but they are not substitutes for section 7 coverage. Section 7 covers *any* federal agency action that could *threaten* species or their critical habitat. While the anti-take provisions prohibit "[e]liminating a threatened species' habitat," *Envtl. Prot. Info. Ctr.*, 255 F.3d at 1075, or "significant . . . modification or degradation where it actually kills or injures wildlife," 50 C.F.R. § 17.3, the effectiveness of these prohibitions depends on their enforcement by the appropriate authorities. "[T]he Government cannot enforce the § 9 prohibition until an animal has actually been killed or injured." *Sweet Home*, 515 U.S. at 703, 115 S. Ct. 2407. Accordingly, after-the-fact enforcement cannot prevent threats to listed species the way section 7 can. Prevention of takings may come from the section 10 permitting process, but private parties *choose* whether to pursue a section 10 incidental take permit. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000). Private parties only have an incentive to do so if there is a meaningful threat of section 9 enforcement.

On this record, there is no indication that section 9 is or will be enforced meaningfully enough to provide a suf-

ficient substitute for section 7. The record reflects no instances in which FWS has initiated a section 9 enforcement action with regard to listed species in Arizona. Additionally, FWS staff stated in the Interagency Elevation Document that they did "not believe that section 9 enforcement is an acceptable substitute for section 7 consultation." This opinion reflected staff concerns, expressed in internal emails, that section 9 is ill-suited to protect species such as the pygmy owl, whose numbers are so low that section 9 enforcement may come too late to prevent extinction. The Biological Opinion contains no indication the FWS will increase section 9 enforcement nor any other analysis alleviating FWS staff concerns. The absence of record evidence of section 9 enforcement is confirmed by our own research, which reveals public notices regarding only two applications for incidental take permits for projects occurring in Arizona since January 1, 2001. *See* 69 Fed. Reg. 75,556 (Dec. 17, 2004); 69 Fed. Reg. 15,362 (Mar. 25, 2004). Compared to the large number of construction projects in the state, this low number suggests that developers do not feel that section 9 enforcement is sufficiently likely for them to apply for section 10 permits.

d. Arizona state law

The Biological Opinion notes one Arizona law that prohibits the taking of "native plants"—which, the Opinion notes, includes endangered or threatened plants—from any land within the state without following certain procedures. *See* Ariz. Rev. Stat. § 3-904. The Opinion implies that this law partially fills a gap left open by the Endangered Species Act, which limits the taking of endangered plants on federal land only, not all land. *See* 16 U.S.C. § 1538(a)(2)(B).

The Arizona statute, however, is not an adequate substitute for section 7(a)(2)'s limitation on granting permits that could jeopardize listed species. As the Biological Opinion notes, the Arizona statute merely requires private landowners to notify a state agency of plans to destroy certain plants on their property and regulates when that destruction may take place. *See* Ariz. Rev. Stat. § 3-904. It does not prohibit such destruction, or set standards to be taken into account in the issuance of water pollution permits. The Biological Opinion does not discuss the standards that govern Arizona's regulation of native plant takes, and does not indicate that Arizona considers the listed status of plants for federal purposes in granting native plant take permits.

In sum, the Biological Opinion fails to provide a reasoned explanation concerning why Arizona's native plant law adequately substitutes for section 7, even for plants. As it obviously does not do so for animals, § 3-904 is no substitute for section 7(a)(2) of the Endangered Species Act.

3. The EPA's reliance on the Biological Opinion

The EPA had an independent duty under section 7(a)(2) to ensure that its pollution permitting transfer decision was not likely to jeopardize listed species or adversely modify their habitat. Arbitrarily and capriciously relying on a faulty Biological Opinion violates this duty. *Res. Ltd.*, 35 F.3d at 1304; *Pyramid Lake*, 898 F.2d at 1415.

When considering challenges to agency actions based on *factual* objections to the Biological Opinion, however, we have held that an agency can satisfy the arbitrary and capricious standard of review even if it relies on an "admittedly weak" Biological Opinion, if there is no "infor-

mation the Service did not take into account which challenges the [biological] opinion's conclusions." *Id.*; *see also Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984). This holding is based on the notion that action agencies should be able to rely on the expert judgments that underlie most Biological Opinions. *See id.* (twice noting reasonableness of action agency's reliance on "the *expert* agency") (emphasis added). Here, however, the Biological Opinion's flaws are *legal* in nature. Discerning them requires no technical or scientific expertise. The EPA should have understood the legal errors of the Biological Opinion's analysis. Its failure to do so led to an action based on reasoning "not in accordance with law" and is thus arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A).

Even applying the *Pyramid Lake* standard, the EPA acted arbitrarily and capriciously. Information not considered by the Biological Opinion that challenges its conclusion includes FWS staff members' articulated, specific concerns about the impact of the loss of section 7 consultation, supported by information regarding the effect of past section 7 consultations.

The EPA notes that it relied on two pieces of evidence supporting its conclusion *beyond* that contained in the Biological Opinion and argues that consideration of this evidence provided the reasoned consideration that the arbitrary and capricious standard requires.[25]

The first such evidence is the EPA's own Biological Evaluation. This report focused largely on Clean Water

[25] Any explanation for its decision based on facts or reasoning not in the Biological Opinion must, of course, satisfy the EPA's substantive obligations under section 7(a)(2) and the arbitrary and capricious standard of review discussed above.

Act requirements and devoted only a few pages to endangered species. The report summarizes the EPA-FWS Memorandum of Agreement, Endangered Species Act anti-take provisions, EPA oversight of ADEQ's permit program, and Arizona's native plant laws, without addressing their limitations, discussed above. The report's "Discussion of Effects" notes the loss of section 7 consultation, but otherwise focuses on Clean Water Act compliance and repeats the protections afforded by other programs. It does not discuss the impact on listed species of the loss of section 7 consultation and mitigation and so adds nothing to the Biological Opinion.

The second piece of evidence on which the EPA relies is an "assurance[ ] from the Arizona Game and Fish Department . . . that Federally-listed species would not suffer" from the lack of section 7 consultations. This document is from an Arizona official of a state department that is *not* the one that will issue Clean Water Act permits. He writes that the EPA-FWS Memorandum of Agreement "will serve as a guideline for . . . Arizona to ensure that [pollution] permits will not negatively impact endangered and threatened species."

There is no indication that Arizona would be bound by this letter. The ADEQ, the agency primarily responsible for implementing Arizona's pollution permitting authority, has not subscribed to its assurances. Nor does the letter writer explain by what authority Arizona will "ensure that . . . permits will not negatively impact endangered and threatened species," or indicate that his agency has any authority to do so, let alone authority as broad as the protections mandated by the Endangered Species Act as applied by the EPA.

In the abstract, voluntary compliance by state agencies willing to follow FWS recommendations to the same extent as would the EPA *might* substitute for section 7 coverage. The EPA, however, could not so conclude without first analyzing the likelihood that *all* relevant Arizona agencies can and would live up to the Game and Fish Department's promises, as well as considering the effectiveness of federal oversight if Arizona agencies fail to live up to any such promises.

Given its serious faults, the independent evidence on which EPA relies cannot fill in the crucial gaps in the Biological Opinion. Neither the Biological Opinion nor the EPA, consequently, adequately considered indirect effects of the transfer. The EPA thus "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43, 103 S. Ct. 2856. Because neither the Biological Opinion nor the EPA examined all relevant data, the EPA's transfer decision was arbitrary and capricious.

4. Summary

The EPA's most serious errors were (1) its failure to understand its own authority under section 7(a)(2) to act on behalf of listed species and their habitat and (2) its failure to discuss the specific effects of its decision on the various listed species present in Arizona. It is possible that some combination of state and federal protections for listed species and state agency cooperation with the federal Memorandum of Agreement might sufficiently replace the benefits of section 7 consultation so that no harm to listed species would be "reasonably certain to occur" as a result of losing section 7 consultation. 50 C.F.R. § 402.02. But the EPA could not so conclude without specifically analyzing each listed species within Ari-

zona and without more certain assurances of voluntary state cooperation from officials at *all* relevant Arizona agencies, as well as a more careful consideration of the actual protection accorded by other federal and state statutory provisions and the Memorandum of Agreement.

IV. Remedy

Typically, when an agency violates the Administrative Procedure Act and the Endangered Species Act, we vacate the agency's action and remand to the agency to act in compliance with its statutory obligations. In certain instances, however, "when equity demands, the [challenged action] can be left in place while the agency follows the necessary procedures." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995).

We have carefully considered whether equitable considerations warrant allowing Arizona to maintain its authority over pollution permitting decisions while the EPA "follows the necessary procedures," beginning with consultations with the FWS based on legal understandings consistent with this opinion. Arizona has undoubtedly expended significant funds to obtain and implement pollution permitting authority and granted a significant number of permits pursuant to this authority.[26] We cannot reverse the expenditure of those funds nor the issu-

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[26] For instance, one type of water pollution permit issued by Arizona under its pollution permitting authority, stormwater discharge permits, account for approximately 20,000 permit applications annually. ARIZ. DEP'T OF ENVT'L QUALITY, *ADEQ Director Steve OwensUnveils a Web-based System to Apply for Stormwater Discharge Permits, at* http://www.azdeq.gov/function/news/2003/june.html#609 (last visited July 5, 2005).

ance of those permits. We further recognize the administrative difficulties in transferring a program like pollution permitting from Arizona back to the EPA and very possibly back to Arizona again. Based on the desire of Arizona to keep its pollution permitting authority and the record of other states obtaining and maintaining their own pollution permitting authority, even after full consultation regarding the transfer's effect on endangered and threatened species, *see supra* note 3, it seems likely that Arizona will again apply for pollution permitting authority. Finally, we note that all of the actors in this case—Arizona, the EPA, and FWS—operated in a somewhat murky legal environment. Faced with two circuit court cases suggesting that the EPA lacked authority to make pollution permitting transfer decisions based on Endangered Species Act concerns, "the extent of doubt whether the agency chose correctly" was not insignificant. *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002).

Other factors, however, weigh heavily in favor of vacating the EPA's approval of Arizona's transfer application. As noted above, Arizona annually issues tens of thousands of pollution permits pursuant to the EPA's action. *See supra* note 22. We have concluded that, absent section 7 coverage, we have no strong assurances that these permits will not allow development projects that are likely to jeopardize listed species or adversely modify their habitat. The purpose of the Endangered Species Act—to conserve endangered and threatened species rather than allow them to go extinct, *see* 16 U.S.C. § 1531—renders the risk of harm to listed species too great. This is particularly true in this case, in which the record suggests that one species—the pygmy owl—numbers less than 100. Temporary harms while the

agency "follow [ed] the necessary procedures," *Idaho Farm Bureau*, 58 F.3d at 1405, could lead to the permanent harm of extinction. *See id.* (noting "the potential extinction of an animal species" as a crucial factor to consider when determining whether a challenged agency action should be vacated). Our concern with the risk of extinction comports with our understanding of the Endangered Species Act's "institutionalized caution mandate." *Wash. Toxics*, 413 F.3d at 1030 (quoting *Sierra Club*, 816 F.2d at 1389). Without greater assurances that harm to listed species would not occur, our "institutionalized caution" makes us unwilling on the present record to order any remedy other than vacation of the EPA's approval of Arizona's transfer application.

For the just-stated reasons, we vacate the EPA's decision to approve Arizona's pollution permitting application. Pursuant to 28 U.S.C. § 1631, we transfer Defenders' Endangered Species Act and Administrative Procedure Act suit challenging the validity of the Biological Opinion to the district court where it was originally filed for proceedings consistent with this opinion. The petition for review is GRANTED and REMANDED to the EPA for proceedings consistent with this opinion.

THOMPSON, Senior Circuit Judge, dissenting:

Because I disagree with the conclusion in Part III of the majority opinion that the EPA had the authority to consider the impact on endangered and threatened species in making its decision to transfer administration of the pollution permitting system to the State of Arizona, I respectfully dissent.

As the majority observes, the requirements of section 7 of the Endangered Species Act "apply to all [agency] actions in which there is discretionary Federal involve-

ment or control." 50 C.F.R. § 402.03. "Where there is no agency discretion to act, the [Endangered Species Act] does not apply." *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998). We have previously held that an agency lacks the requisite discretion to act when the agency does not have the authority to take action on behalf of endangered or threatened species. *Ground Zero Ctr. for Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (where agency lacks discretion, to require compliance with section 7 of the Endangered Species Act "would be an exercise in futility"); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) ("[T]he discretionary control retained by the federal agency must have the ability to inure to the benefit of a protected species. If no discretion to act is retained, then consultation would be a meaningless exercise.") (internal citation omitted); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) ("[W]here . . . the federal agency lacks the discretion to influence the . . . action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species.").

The majority interprets the "discretionary involvement" language of 50 C.F.R. § 402.03 to be "coterminous with" all actions "authorized, funded, or carried out" by a federal agency. Stated differently, the majority now holds that *any* action which comes within a federal agency's decisionmaking authority falls within the scope of section 7(a)(2) of the Endangered Species Act. In my view, our cases do not take such an expansive view of the meaning of § 402.03. Rather, we have consistently recognized that an agency may have decisionmaking authority

and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered or threatened species. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074-75 (9th Cir. 1996) (federal agency's decision to consult with and to provide advice to private entity was not discretionary agency action triggering section 7); *Sierra Club v. Babbitt*, 65 F.3d at 1508-1510 (holding that although the Bureau of Land Management retained the right to object to a road development project in three specified circumstances, "the agency simply [did] not possess the ability to implement measures that inure to the benefit of the protected species."); *cf. Turtle Island Restoration Network*, 340 F.3d at 975 (concluding that Congress' decision to use the words "'including but not limited to'" in the statute granting the Fisheries Service the authority to issue fishing permits "contemplated that the list of potential obligations that the United States had under the Agreement was not exhausted by those listed in the subsection").

Here, the EPA did not have discretion to deny transfer of the pollution permitting program to the State of Arizona; therefore its decision was not "agency action" within the meaning of section 7 of the Endangered Species Act.[1] The Clean Water Act, by its very terms, per-

[1] The majority concludes that pursuant to *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943) (*Chenery I*), it may not deny the petition for review on this basis because the EPA did not contend that it lacked discretion to consult under section 7 in conjunction with the transfer of pollution permitting authority to Arizona. We have, however, previously declined to take such a broad view of *Chenery* and instead have observed that although "[g]enerally, a reviewing court may only judge the propriety of an agency's decision on the grounds invoked by the agency, . . . the court is not so bound when, as here, the issue in dispute is the interpretation of a federal statute."

mits the EPA to consider only the nine specified factors. If a state's proposed permitting program meets the enumerated requirements, the EPA administrator "shall approve" the program. 33 U.S.C. § 1342(b). This Congressional directive does not permit the EPA to impose additional conditions. Although the majority quite properly concludes that a federal agency cannot escape its obligation to comply with section 7 of the Endangered Species Act when it is "bound to comply with another statute that has consistent, complementary objectives," *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005), here, the EPA has an obligation to evaluate the state's application against nine *exclusive* requirements. 33 U.S.C. § 1342(b); *see also Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) ("The language of § 1342(b)] is firm: . . . 'Unless the Administrator of EPA determines that the proposed state program does not meet [the specified] requirements, he must approve the proposal.'") (quoting *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1285 (5th Cir. 1977)); *Nat'l Res. Defense Council v. EPA*, 859 F.2d 156, 173-74 (D.C. Cir. 1988) (observing that "[t]he [Clean Water Act] specifies prerequisites for state assumption of the program . . . and commands the Administrator to approve the state permit

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Ry. Executives' Ass'n v. ICC, 784 F.2d 959, 969 (9th Cir. 1986). The majority's conclusion further disregards our obligation to review an agency's statutory mandate de novo, *see Portland Adventist Med. Ctr. v. Thompson*, 399 F.3d 1091, 1095 (9th Cir. 2005); *see also Am. Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000) (noting that review of "substantive issues of statutory construction" "proceed[s] along [a] different analytic path[ ]" and is "subject to [a] separate standard[ ] of review" than review of an agency's compliance with procedural requirements), and, in doing so, to "give effect to the unambiguously expressed intent of Congress." *Chevron v. Nat'l Res. Defense Council*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

system once he determines that the statutory requirements and administrative guidelines are met."). To impose the additional requirement of consultation under section 7 would be inconsistent both with the EPA's statutory obligation to consider only the requirements enumerated in § 1342(b) and with the Clean Water Act's clearly expressed objectives. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and "that the States will manage . . . and implement" the NPDES pollution permitting program).

Nor, in my view, does the EPA possess the kind of continuing authority to monitor states' administration of their pollution permitting programs that would render its oversight discretionary. As the majority notes, the EPA's limited oversight under 33 U.S.C. § 1342(c) relates only to the substantive standards of the Clean Water Act and does not grant any additional continuing review authority that would permit meaningful section 7 consultation. The EPA's authority to grant or to deny the State of Arizona's application to administer the pollution permitting program was nondiscretionary; I would deny the petition for review. 420 F.3d 946, 60 ERC 2025, 35 Envtl. L. Rep. 20,172, 05 Cal. Daily Op. Serv. 7480, 2005 Daily Journal D.A.R. 10,216.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-71439, 03-72894

DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT, NATIONAL ASSOCIATION OF HOME BUILDERS; STATE OF ARIZONA; ARIZONA CHAMBER OF COMMERCE, INTERVENORS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ROBERT B. FLOWERS, RESPONDENTS

June 8, 2006

ORDER

Before: STEPHEN REINHARDT, DAVID R. THOMPSON, and MARSHA S. BERZON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc. Fed. R. App. P. 35. The request for panel rehearing and rehearing en banc is DE-

NIED. Judge Kozinski's and Judge Kleinfeld's dissents from denial of en banc rehearing, and Judge Berzon's concurrence in denial of en banc rehearing, are filed concurrently herewith.

KOZINSKI, Circuit Judge, with whom Judges O'SCANNLAIN, KLEINFELD, TALLMAN, CALLAHAN and BEA join, dissenting from denial of rehearing en banc:

Less than two years ago, the Supreme Court unanimously reversed our interpretation of the National Environmental Policy Act (NEPA). *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004). Tone-deaf to the Supreme Court's message, the panel majority in this case interprets the Endangered Species Act (ESA) in precisely the same incorrect way we interpreted' NEPA, dramatically expanding agencies' obligations under the law. Along the way, the majority tramples all over the Fish and Wildlife Service's (FWS) reasonable interpretation of the ESA, deliberately creates a square inter-circuit conflict with the Fifth and D.C. Circuits, and ignores at least six prior opinions of our own court. Finally, the decision is one of considerable importance to the federal government and the states of our circuit. This is precisely the kind of case we should take en banc to set our own house in order.

Background

The Clean Water Act (CWA) instructs that the Environmental Protection Agency (EPA) "shall" transfer pollution permitting authority to a state if the state's proposal meets nine criteria. *See* 33 U.S.C. § 1342(b). None of the criteria involves consideration of endangered species. Arizona applied to take over the CWA permitting process within its borders—the forty-fifth state to

do so. There is no dispute that its proposal met all nine criteria listed in the CWA.

The EPA regional office in San Francisco, however, was worried that the transfer might affect endangered species. *See* 16 U.S.C. § 1536(a)(2) (section 7(a)(2) of the ESA) (requiring federal agencies to "insure" that their actions do not jeopardize endangered species). It thus initiated consultation with FWS pursuant to ESA section 7. The regional office also stated publicly that section 7 required EPA to take endangered species into account when making a transfer decision. FWS's local office in Arizona similarly expressed concerns about the transfer.

Next, the matter was "elevated," meaning the national offices of EPA and FWS took over. After national-level discussions, FWS reversed course, recommending immediate approval of the transfer. That agency issued a Biological Opinion (BiOp) concluding that any impact of the transfer on endangered species would be the unavoidable result of (1) Congress's decision to make ESA section 7 inapplicable to the states, and (2) Congress's decision to *require* transferring the permitting process to the states, provided the nine criteria were met (none of which included consideration of endangered species). Thus, under FWS's interpretation, the ESA was inapplicable: EPA's decision to grant the transfer could not "cause" any impact on endangered species because the decision was non-discretionary. Two days after receiving FWS's recommendation, EPA approved the transfer.

Discussion

In striking down EPA's transfer approval, the majority makes five fundamental blunders: First, it mistakes EPA's internal deliberations for analytical inconsistency. Second, the majority fails to give appropriate deference

to FWS's interpretation of the ESA. Third, the majority treats the ESA as superior to all other laws, thereby nullifying a crucial ESA regulation and forcing agencies to violate their governing statutes. Fourth, the majority contradicts the Supreme Court's recent pronouncement in *Public Citizen.* Finally, the majority dismisses the reasoned opinions of two other circuits, creating a square conflict.

1. The majority first finds that EPA's decision-making process was internally inconsistent. *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 959-62 (9th Cir. 2006). On the one hand, EPA stated several times that the ESA required it to consider endangered species before approving the transfer. On the other hand, the agency concluded it had no discretion under the CWA to take endangered species into account when making the transfer decision. Thus, the majority finds, EPA's decision "cannot stand." *Id.* at 962.

The majority makes a big fuss over the supposed internal inconsistency in EPA's reasoning, but the so-called problem is of the panel's own making. The only "inconsistency" is between the San Francisco regional office's interpretation of the ESA and the interpretation by EPA headquarters in Washington, D.C. In other words, EPA changed its mind upon further reflection at a higher level. The agency's position is that adopted by EPA at the national level; the position taken by the agency's regional office was simply overruled by the national office in Washington. There is no inconsistency in the agency's final action, which is the only one we are entitled to review. *See* 5 U.S.C. § 704.

The majority also points out that EPA's final action in this case was inconsistent with the actions it has taken

when other states have applied for a transfer. *See Defenders of Wildlife*, 420 F.3d at 952 n.3 (noting that all of EPA's transfer decisions since 1993—six besides Arizona—have taken endangered species into account, whereas none before 1993 did). But there is no indication that EPA's deliberations in the other cases were ever elevated to the national level. As far as we know, this is the only case in which EPA's Washington, D.C. office has opined on the applicability of the ESA to the transfer of the CWA permitting process. Moreover, an agency is not locked into a particular position forever; it is entitled to change its view over time. *See Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1130 (9th Cir. 1988) (en banc). EPA's actions in other cases are irrelevant to whether its analysis was internally inconsistent in this one.

In any event, the majority's finding of an inconsistency in EPA's analysis, if correct, should have been the end of the case; the majority should have remanded to EPA for further clarification, as the agency asked the panel to do. *See Defenders of Wildlife*, 420 F.3d at 969 n.19. Even the majority itself says it "must remand" to EPA for clarification. See *id.* at 962. Instead, it embarks on a 17-page boondoggle, conducting the very analysis that EPA should have had an opportunity to conduct for itself. *See Gonzales v. Thomas*, _____ U.S._____ , _____, 126 S. Ct. 1613, 1614, 164 L. Ed. 2d 358 (2006) ("The Ninth Circuit's failure to remand is legally erroneous, and that error is 'obvious in light of *Ventura,*' itself a summary reversal.").

2. In faulting EPA for its alleged internal inconsistencies, the majority misconstrues the way the ESA was meant to operate. Under the ESA, a federal agency must

consider whether its action "may affect" endangered species. 50 C.F.R. § 402.14(a). If the agency thinks endangered species *might* be affected, it must ask FWS whether its supposition is correct—whether its action *would*, in fact, affect endangered species—and, if so, what the impact on endangered species will be. *See id.*; *id.* §§ 402.14(e), (h). Then, FWS must respond by issuing a BiOp that the agency must take into account before making its decision. *See id.* §§ 402.14(e), 402.15(a).

In this case, EPA was initially concerned that its approval of Arizona's transfer application might affect endangered species. EPA does not administer the ESA, so it doesn't have the expertise to know for sure. *See Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998). In order to find out whether its transfer approval *would*, in fact, affect endangered species, EPA did exactly what it was supposed to do: It asked FWS, the agency that *is* charged with administering the ESA. *See United States v. McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998). And FWS did exactly what *it* was supposed to do: It responded with a BiOp informing EPA that its approval would not, in fact, affect endangered species. *See* p. 396 *supra*. With this advice from the congressionally designated experts in hand, EPA decided that its initial concerns were unfounded and that it could go forward with the transfer approval.

The majority finds this perfectly logical sequence of events to be "nonsensical" and impermissible. *See Defenders of Wildlife*, 420 F.3d at 961. According to the majority, once EPA expressed concern that its action might affect endangered species, it had already conclusively determined that its decision was governed by the ESA. *See id.* In other words, under the majority's inter-

pretation, once FWS is consulted for guidance, it is precluded from ever determining that the ESA is inapplicable.

With all due respect to my colleagues, it is *their* conclusion that is nonsensical, undermining the entire consultative process that the ESA establishes and striking down FWS's perfectly reasonable interpretation of the ESA. The majority forgets that FWS is the agency charged with administering the ESA, and that its interpretation of the ESA is thus entitled to *Chevron* deference. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). Here, FWS determined—after careful study at the local and national levels—that the ESA was inapplicable to EPA's decision, and it issued a BiOp relaying its conclusion to the EPA. The majority cannot overturn FWS's statutory interpretation simply because it disagrees with it.

3. Having decided to conduct—on its own—the very analysis that FWS already conducted, the majority comes out the other way, getting it flatly wrong. The majority concludes that section 7 of the ESA required EPA to take endangered species into account when making the transfer decision, notwithstanding the plain contrary language of the CWA. It thus transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute. *See Defenders of Wildlife*, 420 F.3d at 963-67.

Further, the majority handily disposes of a regulation issued by FWS that was supposed to limit ESA's applicability to "actions in which there is *discretionary* Federal

involvement or control." 50 C.F.R. § 402.03 (emphasis added). Unable to reconcile this regulation with its newly expansive interpretation of the ESA's mandate, the majority simply finds that the word "discretionary" in the regulation is meaningless; the regulation, announces the majority, is "coterminous" with the statute it interprets. *See Defenders of Wildlife*, 420 F.3d at 967-69. In other words, despite FWS's regulation, the majority finds that the ESA applies to anything "authorized, funded, or carried out" by a federal agency, 16 U.S.C. § 1536(a)(2), whether discretionary or not. Again, the majority fails to give FWS the deference it is due.[1]

In his dissent, Judge Thompson succinctly identifies the serious flaws in the majority's analysis. He points out that EPA had no authority under the CWA to consider endangered species when making the transfer decision. And he explains that the majority's interpretation of the scope of ESA's applicability contradicts our precedents: "[W]e have consistently recognized that an agency may have decisionmaking authority and yet not be empowered . . . to act to protect endangered species." *Defenders of Wildlife*, 420 F.3d at 979-80 (Thompson, J., dissenting) (citing six Ninth Circuit precedents that contradict the majority's holding). Once the nine criteria were met, the dissent concludes, the CWA mandated the transfer; nothing in ESA section 7 allows—let

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[1] The majority points out that "§ 402.03 is a regulation, *not* a statute," *Defenders of Wildlife*, 420 F.3d at 969 n.19, as if that somehow robs its interpretation of deference. But FWS issued the regulation in question. *See id.* at 951 n.1. Its interpretation of the regulation is therefore also entitled to "substantial deference." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991) (internal quotation marks omitted).

alone requires—the EPA to ignore the clear language of the CWA. *See id.* at 980-81.[2]

4. The majority's superfluous holding—that ESA forces an agency to consider the impact of its decisions on endangered species, even when the agency's governing statute precludes it from doing so—also flies in the face of *Public Citizen,* where the Supreme Court unanimously reversed our interpretation of NEPA. *See* 541 U.S. at 770, 773, 124 S. Ct. 2204.

The issue in *Public Citizen* was whether NEPA "require[s] the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers" before deciding whether to grant registration to Mexican trucks. *Id.* at 756, 124 S. Ct. 2204. NEPA's language, regarding when and how an agency must take into account the impact of its actions on the environment, is similar to ESA's language regarding endangered species. *Compare* 42 U.S.C. § 4332(2)(C) *and* 40 C.F.R. § 1508.18, *with* 16 U.S.C. § 1536(a)(2) *and* 50 C.F.R. § 402.03. And the FMCSA's governing statute, like the CWA, instructs that the agency "shall" grant registration to any carrier meeting certain criteria, none of which involves environmental concerns. *See* 49 U.S.C. § 13902(a)(1).

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[2] We cannot presume that Congress repealed the CWA's categorical mandate sub silentio, simply by passing the ESA. *See* n.4 *infra.* But even if we were inclined to believe, as the panel majority does, that the CWA and ESA need to be reconciled, FWS's regulation is a perfectly plausible way to do so: By limiting the ESA's applicability to "discretionary" agency actions, 50 C.F.R. § 402.03, the regulation avoids the supposed conflict the majority has created between the ESA and governing statutes—like the CWA—that mandate agency action.

In upholding the agency's decision to grant registration without taking into account the environmental impact of Mexican trucks, the Supreme Court stressed that "FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are willing and able to comply with the applicable . . . requirements. FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety." *Id.* at 758-59, 124 S. Ct. 2204 (internal quotation marks and citation omitted). The Supreme Court concluded that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect.[3] Hence, under NEPA . . . the agency need not consider these effects. . . . [B]ecause FMCSA has no discretion to prevent the entry of Mexican trucks, [it] did not need to consider the environmental effects arising from the entry." *Public Citizen*, 541 U.S. at 770, 124 S. Ct. 2204.

The Supreme Court's holding in *Public Citizen* applies equally to this case: Because EPA had no discretion under the CWA to prevent the transfer of permitting authority to Arizona, it did not need to consider the transfer's effects on endangered species. The majority's con-

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[3] The majority quotes this sentence verbatim from *Public Citizen*. *Defenders of Wildlife*, 420 F.3d at 963. But, instead of recognizing that this language controls the case, the majority uses it as a springboard to launch into its unnecessary analysis.

trary conclusion cannot be reconciled with the Supreme Court's unanimous decision.[4]

[4] Judge Berzon's concurrence dismisses *Public Citizen* as "entirely uninformative," concurrence at 406, by labeling NEPA as a "strictly procedural statute" and the ESA as a "partially substantive statute," *id.* What Judge Berzon must be arguing is that the ESA effected a sub silentio repeal of EPA's categorical obligation under the CWA, so that the statutory "shall" was foreshortened to "may." There is absolutely no indication that Congress meant to do any such thing and we should long hesitate before concluding that it did this unknowingly. *See Watt v. Alaska*, 451 U.S. 259, 267, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981) (noting the maxim of statutory interpretation that "repeals by implication are not favored," and stating that "[t]he intention of the legislature to repeal must be clear and manifest" (internal quotation marks omitted)); *id.* at 280, 101 S. Ct. 1673 (Stewart, J., dissenting) ("The maxim that 'repeals by implication are disfavored' has force when the argument is made that a general statute . . . eviscerates an earlier and more specific enactment of limited coverage but without an indication of congressional intent to do so."); *see also Ex parte Yerger*, 8 Wall. 85, 105, 19 L. Ed. 332 (1869) ("Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act.").

If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency. We should be particularly chary of holding that the ESA made such sweeping changes when the agency charged with implementing the statute has adopted a regulation allowing the ESA to coexist peacefully with all categorical mandates. *See* 50 C.F.R. § 402.03; n.2 *supra*. There is no justification for nullifying countless congressional directives by casting aside the agency's authoritative interpretation of the ESA, formally adopted pursuant to notice and comment procedures.

Unless one buys into the dubious proposition that Congress somehow repealed the term "shall" in 33 U.S.C. § 1342(b), this case is a carbon copy of *Public Citizen.* "Shall" means shall here as it did there; thus EPA has no discretion to deny the transfer once the nine statutory criteria are satisfied. *See* Kleinfeld dissent at 401-02. Just as in *Public Citizen,* the agency's action—granting the transfer—is not a legally

5. Finally, the majority opinion squarely, and admittedly, conflicts with the Fifth and D.C. Circuits. *See Defenders of Wildlife*, 420 F.3d at 970. In *American Forest & Paper Ass'n v. EPA*, the Fifth Circuit considered precisely the same question at issue in this case: whether the ESA imposes its own criteria on EPA's decision to transfer CWA permitting authority to a state—in that case, Louisiana—or whether the nine factors enumerated in the CWA are, as the plain text of the statute requires, an exhaustive list that precludes consideration of endangered species. *See* 137 F.3d 291, 297-99 (5th Cir. 1998).

In *American Forest*, unlike in this case, the EPA *wanted* to condition the transfer of the permitting process on protection of endangered species. But the Fifth Circuit determined—in direct contradiction to the majority here—that "[t]he [CWA's] plain language directs EPA to approve proposed state programs that meet the enumerated criteria; particularly in light of the command 'shall approve,' [the CWA] cannot be construed to allow EPA to expand the list of permitting requirements" to include consideration of endangered species. *Id.* at 298. Further, when EPA argued that the ESA compelled it to consider endangered species, the Fifth Circuit inter-

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relevant "cause" of any impact on endangered species because the agency had no discretion in the matter once the statutory criteria were met. *See* 541 U.S. at 769, 124 S. Ct. 2204.

When we are confronted with a question of statutory interpretation, we must take into account the Supreme Court's previous interpretation of highly similar words in an analogous situation, even if the two cases are not "identical." Concurrence at 404. It is no doubt symptomatic of my "myopic" view of the world, *id.* at 406, but I believe we should treat Supreme Court pronouncements as binding, not as mere hazards to navigation.

preted section 7(a)(2) of the ESA to mean exactly the opposite of the majority's holding:

> [I]f EPA lacks the power to add additional criteria to CWA § 402(b), nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA . . . confers no substantive powers. . . . [T]he ESA serves not as a font of new authority, but as something Far more modest: a directive to agencies to channel their *existing* authority in a particular direction. *The upshot is that EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA*.

Id. at 298-99 (second emphasis added) (footnote omitted). In recognition of the circuit split it is creating, the majority dismisses the Fifth Circuit's reasoning out of hand, calling it a "fundamental misconception" and "simply incorrect." *Defenders of Wildlife*, 420 F.3d at 971.

The D.C. Circuit has also considered the ESA's power to override the mandate of an agency's governing statute. *See Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 32-33 (D.C. Cir. 1992). Under the Federal Power Act, the Federal Energy Regulatory Commission (FERC) was precluded from amending the annual licenses it gave to a hydroelectric plant, and thus could not insert wildlife protective conditions into the license upon renewal. *See id.* at 32. Petitioners alleged, however, that notwithstanding the Federal Power Act, section 7 of the ESA required FERC to impose such conditions on the licensee. *See id.* at 33. The D.C. Circuit disagreed:

> The Trust reads section 7 essentially to oblige the Commission to do "whatever it takes" to protect the

> threatened and endangered species that inhabit the Platte River basin; any limitations on FERC's authority contained in the [Federal Power Act] are implicitly superseded by this general command. . . . We think the Trust's interpretation of the ESA is farfetched. As the Commission explained, the statute directs agencies to "utilize their authorities" to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act.

Id. at 34. Like the Fifth Circuit, the D.C. Circuit's interpretation of the ESA directly contradicts the majority's holding in this case. But again, the majority dismisses its sister circuit's reasoning as "cursory" and unpersuasive. *Defenders of Wildlife*, 420 F.3d at 971.[5]

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[5] The majority concedes the conflict with the Fifth and D.C. Circuits but claims it is merely taking sides in a preexisting conflict, because the First and Eighth Circuits have issued opinions agreeing with its position. *See id.* at 970-71 (citing *Conservation Law Found. v. Andrus*, 623 F.2d 712 (1st Cir. 1979), and *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989)). The First and Eighth Circuit cases, however, do not support the majority's position. Both cases addressed situations where the governing statute and the ESA were complementary, not where the governing statute *precluded* consideration of endangered species as the CWA does. *See Andrus*, 623 F.2d at 715 ("[T]he assumption that the ESA and OCSLA are mutually exclusive . . . is incorrect—the standards of these two acts are complementary, and the ESA will continue to apply of its own force. . . ."); *Defenders of Wildlife*, 882 F.2d at 1299 ("FIFRA does not exempt the EPA from complying with ESA requirements when the EPA registers pesticides."). Neither circuit held, as the majority in this case does, that the ESA trumps the governing statute, or that the ESA applies when the governing statute precludes agency discretion regarding endangered species. The inter-circuit conflict is entirely of the panel's own making.

* * *

The majority's opinion has far-reaching effects on the scope of the Endangered Species Act. Its holding—that the ESA imposes an affirmative duty on a federal agency to protect endangered species, even in the face of a governing statute that explicitly precludes the agency from doing so—contradicts FWS's statutory interpretation, ignores the very recent instructions of the Supreme Court, and creates a conflict with two other circuits. And for what? All EPA asks for is to have an opportunity to clarify its position on the issue, and explain why its decision to transfer permitting authority to Arizona made sense. Even more recent Supreme Court instructions emphatically command us to do just that. *See Thomas*, 126 S. Ct. at 1614-15. The majority's stubborn refusal to give the agency that opportunity before vacating its transfer decision has put us in a highly precarious position vis-à-vis the executive branch, the states, the other circuits and the Supreme Court. We should have taken the case en banc and fixed the problems ourselves.

KLEINFELD, Circuit Judge, dissenting from denial of rehearing en banc:

I join in Judge Kozinski's thorough dissent, but write separately to show just how simple this case should have been. As Judge Thompson pointed out in his dissent from the panel's decision, the statute is mandatory. Congress commands that the agency "shall approve" state programs "unless" one or more of nine conditions are not met. The "shall/unless" formula makes the nine condition list exclusive, and courts cannot add conditions to the list.[1] The language has the look of a careful legisla-

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[1] *See, e.g., Department of Transp. v. Public Citizen*, 541 U.S. 752, 767, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2005).

tive compromise necessary to get the votes for passage.[2] The statute leaves no room for conditions ten, eleven, or whatever else we may think Congress should have added.[3]

BERZON, Circuit Judge, concurring in the order denying the petition for rehearing en banc:

I.

I begin by explaining why I am writing this concurrence: A practice has developed in this court of writing dissents from denial of rehearing en banc consideration as a matter of routine. Those dissents sometimes read more like petitions for writ of certiorari than judicial opinions of any stripe. They pose a dilemma for those who believe the original opinion correct, as they may raise issues not addressed by that opinion because not articulated by the parties before the petition for rehearing stage—or ever.

The result, absent some response, is a distorted presentation of the issues in the case, creating the impression of rampant error in the original panel opinion although a majority—often a decisive majority—of the active members of the court either perceived no error or thought the case not one of much consequence. At the

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[2] *Cf. Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 (9th Cir. 2000) ("Legislation often results from a delicate compromise among competing interests and concerns. If we were to 'fully effectuate' what we take to be the underlying policy of the legislation, without careful attention to the qualifying words in the statute, then we would be overturning the nuanced compromise in the legislation, and substituting our own cruder, less responsive mandate for the law that was actually passed.").

[3] Cf. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992).

same time, answering the newly raised contentions by amending the panel opinion is usually not feasible. The court has voted not to rehear en banc the original opinion and ought not to have to accept a new version without a second opportunity to determine whether the opinion deserves en banc consideration. The result, quite obviously, could be a form of infinite regression which precludes us from ever finally deciding the case.

In this case, Judge Kozinski writes an impassioned dissent from denial of en banc consideration, accusing the panel majority of all manner of judicial perfidy. The problem is that his accusations are either flat wrong or indicate a misunderstanding of the holdings in the panel opinion. As the author of the panel opinion, I have no choice but to try to set the record straight. So as to avoid establishing a new tradition of group *concurrences* in denial of en banc to match the group dissents, I intentionally write for myself alone, without the concurrence of any of my colleagues.

II.

The majority opinion in *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), if carefully read, contains responses to most of the baseless attacks that Judge Kozinski has dropped upon it. Among other errors in the dissent from denial of rehearing en banc that are exposed in the opinion are:

> (1) the notion that the national Environmental Protection Agency (EPA) did not endorse in this case the position that the Endangered Species Act requires consultation with regard to Clean Water Act permit-

ting decisions, Kozinski Dissent at 6290-91, when it did, *see Defenders of Wildlife*, 420 F.3d at 959-60;[1]

(2) the repeated assertion that section 401 of the Clean Water Act "precludes" application of the plain language of section 7 of the after-enacted Endangered Species Act, Kozinski Dissent at 6294, when the pertinent part of the Clean Water Act does not mention the Endangered Species Act at all, *see Defenders of Wildlife*, 420 F.3d at 963-69;

(3) the insistence that the Endangered Species Act does not apply to *any* action "authorized, funded, or

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[1] Judge Kozinski insists that "[a]ll EPA asks for is to have an opportunity to clarify its position on the issue, and explain why its decision to transfer permitting authority to Arizona made sense." Kozinski Dissent at 401; *see also id.* at 396. In fact, in its petition for rehearing en banc the EPA quarreled at length with the merits of the majority opinion, and, building upon Judge Thompson's dissent, asserted an intracircuit conflict. The possibility of a remand for clarification of the agency's interpretation of the statute is mentioned in a single footnote and only with regard to the portion of the opinion that discusses EPA's prior inconsistent positions (an inconsistency which, unlike Judge Kozinski, the EPA does not dispute).

Furthermore, Judge Kozinski's citation to *Gonzales v. Thomas*, ____ U.S. ____ , 126 S. Ct. 1613, 164 L. Ed. 2d 358 (2006) is inapposite. In *Thomas,* the Supreme Court faulted this court for not giving the agency an opportunity to decide an issue in the first instance. Here, in contrast, the EPA did decide that a transfer was appropriate and that it did not have the authority to consider the impact on endangered and threatened species of the transfer decision. We disagreed with both conclusions. Now, the EPA wants to decide the issue *again*, explaining its reasoning once more. *INS v. Ventura*, 537 U.S. 12, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002), does not require that an agency have *two* chances to consider a factual or legal question before appellate review, only one. Further, the majority opinion ultimately *does* remand the transfer decision for consideration on proper legal grounds.

carried out" by a federal agency, Kozinski Dissent at 6293, when that is exactly what section 7(a)(2) says, in a perfectly clear statutory requirement that may not be contravened by an interpretative regulation, *see Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 & n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *Defenders of Wildlife*, 420 F.3d at 969;

(4) the allegation that there was not a preexisting circuit split, even though *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989), and *Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir. 1979), held that agencies *do* have to comply with the Endangered Species Act *as well as* their own governing statutes, *see Defenders of Wildlife*, 420 F.3d at 970;

(5) the contention that the analysis contained in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*, 962 F.2d 27, 34 (D.C. Cir. 1992), and *American Forest & Paper Ass'n v. U.S. Environmental Protection Agency*, 137 F.3d 291, 293-94 (5th Cir. 1998), is more accurate than the analysis in *Defenders of Wildlife,* even though those cases rely on the language of section 7(a)(1) and disregard the quite different wording of section 7(a)(2), *see Defenders of Wildlife*, 420 F.3d at 970-71;

(6) the statement that *American Forest* decided precisely the same question addressed in *Defenders of Wildlife,* Kozinski Dissent at 400, when the issue in that case was not what factors the EPA must consider in making the transfer decision but whether the EPA

must impose Endangered Species Act requirements on the states as a condition of transfer;

(7) the accusation that the panel opinion "ignor[ed] at least six prior opinions of our own court," Kozinski Dissent at 395, when the panel opinion discusses and distinguishes those opinions at some length, *Defenders of Wildlife*, 420 F.3d at 967-69; and

(8) the assertion that the Fish and Wildlife Service's (FWS) position regarding the impact of the transfer is entitled to *Chevron* deference, Kozinski Dissent at 398, even though that position required, in part, an interpretation of the Clean Water Act, over which the FWS has no regulatory power, 33 U.S.C. 1251(d) (designating the Administrator of the EPA to "administer this chapter").[2]

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[2] Judge Kozinski also insists that the majority opinion "presume [s] that Congress repealed the CWA's categorical mandate sub silentio, simply by passing the ESA." Kozinski Dissent at 398 n.2. As the opinion makes clear, we do not see the Endangered Species Act as *repealing* any part of the Clean Water Act. Rather, the Endangered Species Act, a later-enacted statute, *adds* one requirement to the list of considerations under the Clean Water Act permitting transfer provision. The repeal accusation places entirely too much weight on the word "shall," supposing that it shuts out any and all additional federal requirements concerning federal decision-making.

Moreover, if the precept disfavoring repeals by implication does apply, the very definite, unqualified language of the after-enacted Endangered Species Act must still prevail. *See United Ass'n of Journeymen v. Reno*, 73 F.3d 1134, 1140 (D.C. Cir. 1996) (finding that a specific, detailed provision precludes operation of an earlier-enacted general statute that would otherwise apply); *id.* at 1142 (Edwards, J., dissenting) (noting that the specific provision did not mention the other provision or statute at issue in the case); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978) (noting that Congress expressly limited the Endangered Species Act's "broad

There is, however, one point upon which Judge Kozinski places much stock—perhaps more than on any other—that is not addressed in the majority panel opinion. The reason for the lapse is not that Judge Kozinski is correct in his emphatic assertions regarding *Department of Transportation v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004), but that he is so wrong that there was no reason we would have addressed his argument in the first instance.

III.

Judge Kozinski boldly asserts that the panel opinion "flies in the face of *Public Citizen*". The assertion that the two cases are identical, even similar, misunderstands both *Public Citizen* and *Defenders of Wildlife* itself, while ignoring a Supreme Court case that *is* closely on point, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).

The Endangered Species Act, at issue in *Defenders of Wildlife,* sets a substantive requirement that all agencies must follow. As *Tennessee Valley Authority* states, the Endangered Species Act "*affirmatively command[s]* all federal agencies 'to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence' of an endangered species." *Defenders of Wildlife*, 420 F.3d at 964 (quoting *Tenn. Valley Auth.*, 437 U.S. at 173, 98 S. Ct. 2279). *Public Citizen* concerned an entirely different environmental statute, the National Environmental Policy Act (NEPA). NEPA, in contrast to the Endangered Species Act, establishes

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sweep" in certain, enumerated situations, and because of such express limitations "we must presume that these were the only 'hardship cases' Congress intended to exempt").

only the requirement that environmental impact must be *considered* when making certain federal decisions. *See* 42 U.S.C. § 4332(2)(C) (requiring a statement of environmental impact for "major Federal actions" but requiring no federal response to any environmental impact demonstrated); *Public Citizen*, 541 U.S. at 756-57, 124 S. Ct. 2204 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989)).

Public Citizen concerned a congressionally enacted moratorium prohibiting certain motor carriers from obtaining operating authority within the United States and authorizing the President to lift the moratorium. *Id.* at 759, 124 S. Ct. 2204. In 2002, the President lifted the moratorium with respect to Mexican motor carriers. *Id.* at 762, 124 S. Ct. 2204. The Federal Motor Carrier Safety Administration, the agency with authority to grant registration to foreign motor carriers, issued rules for monitoring Mexican motor carriers. *Id.* Petitioners sued, claiming that the rules were promulgated in violation of NEPA and the Clean Air Act. *Id.*

The Supreme Court rejected petitioners' arguments. Pertinent here is the Court's discussion of NEPA, as that is the portion of *Public Citizen* with which Judge Kozinski claims *Defenders of Wildlife* is in conflict.[3] Critically for present purposes, NEPA is a procedural stat-

[3] It is worth noting also that, as *Public Citizen* recognized, NEPA requires an agency to provide an Environmental Impact Statement only "if it will be undertaking a '*major* Federal actio[n],' which 'significantly affect[s] the quality of the human environment.'" *Id.* at 763, 124 S. Ct. 2204 (quoting 42 U.S.C. § 4332(2)(C)) (emphasis added). There is no requirement of a "*major* Federal actio[n]" in the Endangered Species Act; any "action authorized, funded, or carried out by the agency" will do. 16 U.S.C. § 1536(a)(2).

ute *only*, *see id.* at 756, 124 S. Ct. 2204; it provides specific steps that must be taken before making decisions with regard to major actions that the agency has authority to undertake, but does not direct that environmental considerations actually influence the action.[4] In contrast, the Endangered Species Act provides that in taking *any* action authorized, funded, or carried out by the agency, *any* agency must meet a substantive requirement—it must not threaten listed species. *See Hill*, 437 U.S. at 188 n.34, 98 S. Ct. 2279 (distinguishing NEPA, as a procedural statute, from the Endangered Species Act, as a substantive statute).

Public Citizen considered whether the Department of Transportation (DOT) was required to "take into account the environmental effects of increased cross-border operations of Mexican motor carriers." *Id.* at 765, 124 S. Ct. 2204. The Supreme Court held that the agency was not required to do so, because it "has no ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican carriers from

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[4] 42 U.S.C. 4332(2)(C) reads:

> [A]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

operating within the United States." *Id.* at 766, 124 S. Ct. 2204. In other words, NEPA's purposes would not be served by requiring the agency to engage in NEPA's procedural steps with regard to a decision it could not make. *Id.* at 769, 124 S. Ct. 2204. Because the DOT in *Public Citizen* had no authority to determine whether to allow in the Mexican trucks, it had no occasion under NEPA to consider environmental factors in making such a decision.

Here, the central question concerns whether EPA has a substantive responsibility and authority, created by the Endangered Species Act itself, to refrain from taking action that threatens listed species. If it does, then there is nothing futile about considering whether endangered species will be affected, for that is the inquiry the statute dictates.

The difference between NEPA, a strictly procedural statute, and the Endangered Species Act, a partially substantive statute, is critical. *Public Citizen* determined because there was *no* statutory authority for the Department of Transportation to ban the Mexican trucks for environmental reasons, there were therefore no procedures mandated by NEPA to inform the phantom decision. Only the most myopic observer could fail to see the difference between a statute that simply provides a procedure to inform decisionmaking processes governed entirely by other statutes from one that sets a *substantive* decisionmaking requirement.

The central dispute in this case concerns the reach of the substantive mandate of section 7 of the Endangered Species Act. The question in this case is one specific to the Endangered Species Act and depends only on the particular language, history, and administrative applica-

tion of that statute. As to that question, *Public Citizen*, a case that has nothing to do with the Endangered Species Act here at issue and that construed a statute with *no* substantive import, emphatically does *not* "appl[y] equally to this case." Kozinski Dissent at 399. Instead, *Public Citizen* is entirely uninformative on the key legal point in this case.

APPENDIX C

[Seal Omitted]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

[Dated: Oct. 13, 2006]

Honorable H. Dale Hall
Director
U.S. Fish and Wildlife Service
1849 C St., N.W.
Washington, DC 20240

Re: Applicability of ESA Requirements to EPA Clean Water Act NPDES State Program Approvals

Dear Director Hall:

Recently, Alaska submitted an application to EPA to administer the National Pollutant Discharge Elimination System (NPDES) program in that State, pursuant to Section 402(b) of the Clean Water Act (CWA), 33 U.S.C. 1342(b).[1] In light of the need to process Alaska's application, we believe that it is appropriate to attempt to clarify both EPA's position and the position of the Services re-

[1] On July 5, 2006 the Administrator received the State of Alaska's NPDES Authorization Application. On August 1, 2006 EPA notified the governor of the State of Alaska via letter that the State's application was incomplete. EPA is working with the State to resolve outstanding issues, and the Agency anticipates that the State will submit a revised application in the near future.

garding application of Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1536(a)(2), to actions under CWA Section 402(b). So that we may properly carry out our obligations in connection with this application, we seek confirmation from your office that the analysis set forth in this letter is consistent with your interpretation of the ESA and its implementing regulations.

In *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), *rehearing denied*, 450 F.3d 394 (9th Cir. 2006) ("*Defenders*"), EPA and the U.S. Fish and Wildlife Service articulated the position that EPA does not have a duty to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service under the Endangered Species Act ("ESA") when EPA takes action on a State's application to administer the National Pollutant Discharge Elimination System ("NPDES") Program under Section 402 of the Clean Water Act ("CWA").[2] Intervenors, National Association of Home Builders, et al., filed a petition for writ of certiorari from that decision on September 6, 2006. The deadline for the federal government to file a petition for certiorari has been extended until October 23, 2006. In the meantime, the

[2] As you know, EPA has consulted with the Services on NPDES program approvals as a matter of practice, but has not adopted a formal national position on whether or not it had a duty to do so since EPA's approval of Louisiana's NPDES program was vacated in part in 1998. See *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 294-98 (5th Cir. 1998) ("*AFPA*") (court of appeals disagrees that the ESA justifies or grants EPA authority to condition NPDES program approval on considerations outside CWA Section 402(b)); 66 Fed. Reg. 11202, 11205 (Feb. 22, 2001) (Memorandum of Agreement between EPA and the Services notes that "EPA's current practice is to consult with the Services where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federally listed species").

court of appeals has granted a stay of the mandate pending review in the Supreme Court. *Defenders*, No. 03-71439, Order (9th Cir. June 16, 2006).

In *Defenders*, the court of appeals found that the record reflected "contradictory" positions regarding the application of ESA Section 7(a)(2) to Arizona's application to administer the NPDES program, and noted that review in that case had been hampered by the lack of a coherent agency interpretation of how the ESA applies in these circumstances. 420 F.3d at 961-62. The court of appeals also found that the ESA confers upon federal agencies authority to protect endangered species that goes beyond that conferred by the agencies' own governing statutes. *Id.* at 964. This decision is at odds with *AFPA*, 137 F.3d at 298 (ESA does not grant EPA authority to expand the criteria in CWA Section 402(b) in evaluating a State NPDES program application), and *Platte River Whooping Crane Trust v. F.E.R.C.*, 962 F.2d 27, 34 (D.C. Cir. 1992) ("[the ESA] does not *expand* the powers conferred on an agency by its enabling act") (emphasis in original), thus creating a split among the circuits on this issue. We are hopeful that obtaining your views on these issues in advance of processing Alaska's application may avoid a repetition of that problem here.

The court of appeals in *Defenders* went on to find that EPA approvals of State applications under CWA Section 402(b) are subject to the obligations contained in ESA Section 7(a)(2); that ruling is the subject of the pending request for Supreme Court review. We believe that it is important in the meantime for EPA and the Services to enunciate a single, coherent interpretation of the ESA as it applies to NPDES program approvals under CWA Section 402(b). For the reasons that follow, EPA concludes

that a proper interpretation of the two statutes leads to the conclusion that Section 7(a)(2) does not apply to approvals of State NPDES programs pursuant to CWA Section 402(b), and EPA seeks concurrence that you share this view.

EPA's position that the no-jeopardy and consultation duties of ESA Section 7(a)(2) do not apply to approval of a State's application to administer the NPDES program is grounded upon three principles. First, because the CWA commands the Agency to approve State applications when clearly defined criteria are met, EPA lacks the discretion to disapprove such an application where these criteria are satisfied. Second, the ESA does not expand EPA's authority to address the concerns of listed species where Congress has limited the Agency's ability to consider such concerns in a given context. Third, the Services' regulations confirm that ESA Section 7 duties do not apply where an agency lacks "discretionary involvement or control" over its action sufficient to benefit listed species or designated critical habitat.

1. <u>The CWA Limits EPA's Discretion to Considering the Criteria in Section 402(b) When Reviewing a State's Application to Administer the NPDES Program</u>.

Congress has provided that a State may issue NPDES permits for discharges to waters within its jurisdiction after EPA approves the State's proposed NPDES program. 33 U.S.C. § 1342(b);[3] *District of Columbia v. Schramm*, 631 F.2d at 860. The courts have consistently held that EPA *must* approve State programs that meet federal CWA requirements. *AFPA*, 137 F.3d at 297

[3] A copy of CWA § 402(b) is enclosed as Appendix A.

(CWA Section 402(b) "provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements"); *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 173-174 (D.C. Cir. 1988) (The CWA "commands the Administrator to approve the state permit system once he determines that the statutory requirements and administrative guidelines are met.") (*citing Citizens for a Better Env't v. EPA*, 596 F.2d 720, 722 (7th Cir. 1979)).[4]

In *AFPA*, the Fifth Circuit found that EPA had impermissibly sought to condition the transfer of NPDES permitting authority to the State of Louisiana on procedures protecting listed species. 137 F.3d at 298. The court found that EPA attempted to require the State to consult with FWS and NMFS regarding the effect of State-issued permits on listed species, and had reserved the power to veto such permits if FWS or NMFS objected to particular permits. *Id.* at 294. The Fifth Circuit found that, "[t]he language of § 402(b) is firm: It provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements." 137 F.3d at 297. None of the nine criteria contemplate or provide for consideration of potential effects to listed species of critical habitat. Because the State

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[4] See, also, *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978) (The result is "a system for the mandatory approval of a conforming State program [which] creates a separate and independent State authority to administer the NPDES pollution controls.") (*quoting Mianus River Pres. Comm. v. EPA*, 541 F.2d 899, 905 (2d Cir. 1976)); *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1285 and n.3 (5th Cir. 1977) ("The Amendments [to the CWA] set out the full list of requirements a state program must meet * * *. Unless the Administrator of EPA determines that the proposed state program does not meet these requirements, he must approve the proposal.").

met the nine requirements, approval was not discretionary, and EPA could not condition approval on meeting endangered species concerns.[5] In short, because the CWA commands EPA to approve State NPDES program applications that satisfy the criteria set forth in CWA Section 402(b), EPA has no choice but to approve such applications.[6]

2. The ESA Does Not Expand Statutory Limits on EPA's Authority.

EPA's understanding is that the ESA itself does not create any new substantive authority for an agency—EPA in this case—to prevent it from acting in accordance with other statutory mandates or to implement or impose conditions for the protection of listed species where Congress has limited such authority under the statutes the agency administers. In the *AFPA* case, the Fifth Circuit explained that "if EPA lacks the power to add additional criteria to CWA § 402(b), nothing in the ESA grants the agency the authority to do so." 137 F.3d at 298. The court concluded that nothing in the language of Section 7 indicated that Congress intended to expand an agency's authority beyond what it possessed under other statutes.

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[5] The court understood EPA's position to be that the CWA "authoriz[ed] the agency to regard the nine requirements § 402(b) as minimum, not exhaustive, criteria." 137 F.3d at 297. To the extent that this represented the agency's position at the time of the *AFPA* litigation, we agree with the Fifth Circuit that such a position cannot be reconciled with the plain language of the statute.

[6] EPA's conclusion that approval of State NPDES Program applications is required where the minimum statutory criteria are met is consistent with Congressional intent underlying CWA Section 402(b). See, *Shell Oil Co. v. Train*, 585 F.2d at 410 ("Congress clearly intended that the states would eventually assume the major role in the operation of the NPDES program.").

Id., see also Platte River Whooping Crane Trust v. F.E.R.C., 962 F.2d at 34 (D.C. Cir. 1992) ("[the ESA] does not *expand* the powers conferred on an agency by its enabling act") (emphasis in original). The *AFPA* case is especially relevant here, since the Fifth Circuit ruled that EPA could not rely on the ESA to expand the factors considered in its decision to authorize Louisiana to administer the NPDES program.

3. Under the Services' Regulations, EPA is not Required to Consult on State NPDES Program Approvals

The Services' ESA regulations also support EPA's conclusion that consultation is not necessary when the Agency approves a State's NPDES program application. "Effects of the action," as defined at 50 C.F.R. § 402.02, are "the direct and indirect effects of an action on the species or critical habitat." Because EPA's approval of a State's application results merely in the administrative transfer of authority over the NPDES program, there are no direct effects to species or habitat. "Indirect effect," according to the Services' regulations, "are those that are *caused* by the proposed action and are later in time, but still are reasonably certain to occur." *Id.* (emphasis added). The FWS's biological opinion regarding EPA's approval of Arizona's application to administer the NPDES program, dated December 3, 2002, made clear that no loss of conservation benefit is "caused" by EPA's decision to approve the State's program. Rather, any impacts to species that might follow transfer of authority over the NPDES program from EPA to a State are attributable to Congress' decision to grant States the right to administer the programs under state law provided the State's program meets the minimum requirements of

402(b) of the Clean Water Act. Because EPA's action is not the "cause" of any effects on species or habitat, the Agency's action has no indirect effects under the Services' regulations.

This conclusion is supported by a recent Supreme Court decision. The Supreme Court made clear in a case involving the National Environmental Policy Act that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004). Here, EPA's lack of discretion to deny NPDES transfer applications where the criteria in CWA Section 402(b) are satisfied argues strongly against a conclusion that the approval of such an application can be viewed as the cause of adverse effects on listed species flowing from state-granted permits.

The Services' regulations further specify that the consultation requirements in Section 7 of the ESA apply "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Until the *Defenders* decision, the Circuit Courts of Appeal had consistently held that the consultation duties outlined in ESA Section 7(a)(2) did not apply to federal agencies unless they possessed discretion under their existing authorities to take actions that might inure to the benefit of listed species.[7] The court in *Defenders*, however, found that the

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[7] *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (Bureau of Land Management approval of road construction was not a "discretionary" action triggering consultation responsibilities where the federal agency lacks "the ability to implement measures that inure to the benefit of the protected species."). See, also, *Ground Zero Center for*

language in Section 402.03 describing "discretionary" agency action "to be coterminous with the statutory phrase limiting Section 7(a)(2)'s application to those cases, 'authorized, funded or carried out' by a federal agency." *Defenders*, 420 F.3d at 969.

EPA seeks confirmation of your view that the court's interpretation of Section 402.03 in *Defenders* is incorrect. Specifically, we are seeking confirmation that without "discretionary involvement or control" that might inure to the benefit of species, EPA's decision to approve a State's NPDES program is not an action subject to the requirements of ESA Section 7. As discussed in section

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Nonviolent Action v. U.S. Dep't of the Navy, 383 F.3d 1082, 1092 (9th Cir. 2004) (The Navy need not consult on the operation of a new missile program where there is no agency discretion to act because consultation "would be an exercise in futility."); *Natural Resources Defense Council v. Houston,*146 F.3d 1118, 1125-26 (9th Cir. 1998) ("Where there is no agency discretion to act, the ESA does not apply."); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) (FWS advisory letter did not constitute a "federal action" triggering a duty to consult under ESA Section 7 because "there was no discretionary federal involvement or control over the Lumber Companies' proposed salvage operations."); *Environmenta1 Protection Information Center v. Simpson Timber Co.,* 255 F. 1073, 1083 (9th Cir. 2001) (FWS was not required to reinitiate consultation under ESA Section 7(a)(2) because it had not retained discretionary control over an earlier-issued incidental take permit sufficient to require the recipient of that permit to take steps that would inure to the benefit of listed species); *In re: Operation of the Missouri River System Litigation*, 421 F.3d 618, 630 (8th Cir. 2005) (Stating, in *dicta*, that "[c]ase law supports the contention that environmental- and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority."); *Strahan v. Linnon*, 187 F.3d 623, 1998 WL 1085817 at *3 (1st Cir. 1998) (ESA Section 7 does not apply to Coast Guard actions compelled by another statute.).

1 of this letter, EPA lacks the discretion to do anything but approve a State's application to administer the NPDES program once the Agency concludes that the criteria enumerated in CWA Section 402(b) are satisfied. Because EPA must approve State programs that meet the statutory criteria in CWA Section 402(b), and because none of these criteria give the Agency discretion to consider protection of listed species or designated critical habitat in deciding whether to approve an NPDES program, the Agency's approval decision is not "discretionary" under the Services' regulations.

For the above reasons, EPA believes that the provisions of Section 7(a)(2) regarding consultation with the Services, do not apply when the Agency considers whether to approve or disapprove a State's application to administer the NPDES program. I request confirmation from you by October 20, 2006, that you agree with the interpretations of the ESA and the Services' regulations in this letter. I appreciate your attention to this matter and look forward to discussing this issue with you to facilitate EPA's consideration of the renewed application we expect to receive from Alaska, and of other State applications we may receive in the future.

Sincerely,

/s/ BENJAMIN H. GRUMBLES
BENJAMIN H. GRUMBLES
Assistant Administrator

Enclosure

APPENDIX D

[Seal Omitted]

United States Department of the Interior

FISH AND WILDLIFE SERVICE
WASHINGTON, D.C. 20460

[Dated: Oct. 17, 2006]

Honorable Benjamin H. Grumbles
Assistant Administrator
United States Environmental Protection Agency
Washington, D.C. 20460

Re: Applicability of Endangered Species Act Requirements to the Environmental Protection Agency's Clean Water Act National Pollutant Discharge Elimination System State Program Approvals

Dear Mr. Grumbles:

This letter responds to your letter regarding Alaska's application to the Environmental Protection Agency (EPA) to administer the National Pollutant Discharge Elimination System (NPDES) program in that State, pursuant to section 402(b) of the Clean Water Act (CWA), 33 U.S.C. 1342(b). As you note, EPA has no discretion to disapprove such an application based upon criteria (such as protection of listed species) not listed in CWA Section 402(b) itself. Moreover, you state your interpretation that ESA Section 7 does not expand EPA's authority to address the protection of listed species

where Congress has limited the Agency's ability to consider such concerns. You further note that the joint Interior Department/Commerce Department regulations interpret ESA Section 7 duties not to apply when an agency lacks "discretionary involvement or control" over its action sufficient to benefit listed species or designated critical habitat. Accordingly, you conclude that CWA Section 402(b)'s mandate to approve State applications precludes the jeopardy avoidance and consultation duties of ESA Section 7(a)(2). You asked for confirmation that the U. S. Fish and Wildlife Service (Service) agrees with your analysis with regard to ESA Section 7 and its implementing regulations. As discussed below, and consistent with your conclusion on the lack of discretion under the statute in rendering EPA's approval, and with the advice of the Solicitor, we concur with these conclusions.

This letter will also serve to clarify the agencies' position in light of the decision in *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946, 963 (9th Cir. 2005), *rehearing en banc denied,* 450 F.3d 394 (9th Cir. 2006). The court of appeals in that case perceived an inconsistency in the agencies' position regarding consultation and the no jeopardy determination, and it misunderstood the meaning and import of one of the joint regulations under the ESA, 50 C.F.R. 402.03.

We acknowledge that the Service has previously consulted with EPA on the transfer of the NPDES program to States. Further, in January 2001, the Service, National Oceanic and Atmospheric Administration (NOAA), and EPA entered into a Memorandum of Agreement (MOA) regarding enhanced coordination under the CWA. Text in the Federal Register accompanying the published MOA noted EPA's practice of consulting with the

Services on NPDES program approvals. However, these earlier consultations and the adoption of the MOA predated our latest implementation of ESA Section 7 in connection with Arizona's Section 402(b) application. The prominence of the statutory mandate in Section 402(b) and the impact of that Congressional mandate on the Service's evaluation of indirect effects had not received serious consideration in those earlier decisions. The consultation on the Arizona application, together with a more extensive examination of the statutory and regulatory provisions that govern the Section 7 consultation requirement and our evaluation of recent court rulings, also now lead us to conclude that EPA is not required to consult on applications to approve State programs under Section 402(b) of the CWA.

The Arizona consultation process made clear that EPA's approval of Arizona's application should not properly be regarded as the legal cause of future development in Arizona that would require an NPDES permit from the State, or of any impact on listed species as a result. The Service recognized that, due to the stated intent of the Congress in Section 402(b) of the CWA, State programs that meet the requirements of that section shall be approved, and any evaluation of indirect effects arising from that decision would be speculative at best. Biological Opinion at 21. Our conclusion is supported by the Supreme Court decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), which held that it is necessary to take into account the purposes and policies behind a particular statutory regime in determining questions of causation and federal agency responsibility for future effects that may arise from agency actions.

In the evaluation of the Arizona application, the Service was struck by the lack of EPA discretion to address future development effects that might arise once the State program was approved. The Service was also aware of the Congressional mandate that compels EPA to approve State NPDES programs if the statutory criteria are satisfied. The mandatory legal requirements that pervade EPA's decision-making process under Section 402(b) convinced the Service that there is no significant causal linkage between EPA's decision under Section 402(b) and possible future development activities. This conclusion played a predominant role in the Service's decision to issue a "non-jeopardy" biological opinion on the proposed EPA decision to approve the Arizona application. As we pointed out in the Biological Opinion concerning the Arizona application, we have construed Section 7(a) to require consideration of direct effects of an agency's proposed action (which are not at issue here) and "indirect effects" as defined in 50 C.F.R. 402.02—i.e., effects that are *both* "caused by the proposed action" *and* are "later in time, but still reasonably certain to occur." See Biological Opinion at 20. Applying that standard, we concluded that any development that occurred after Arizona assumed responsibility for the program – and hence any resulting impact on listed species or their critical habitat – would not be "caused" by EPA's approval of Arizona's application, but instead would be due to Congress's mandate that an application be approved if specified criteria are satisfied. *Id*. at 20-21, 22-23.

In retrospect, the Service could have halted the consultation process on the Arizona application once it determined that the mandatory nature of the Section 402(b) meant that EPA's action would not be the cause of possi-

ble future development activities within the State. Biological Opinion at 23. In light of our Arizona experience and the interpretations noted below—and because EPA has interpreted Section 402(b) to mandate approval of a State's application where (as in the Arizona case) the specified criteria are satisfied—there is no need to conduct Section 7 consultations on proposed actions to approve State NPDES programs because such actions are not the cause of any impact on listed species and do not constitute discretionary federal agency actions to which Section 7 applies. Even if adverse effects from future private development activities had been anticipated in the context of the proposed approval of Arizona's program, such adverse effects result from *Congress's* decision to mandate the approval of the State's NPDES program–*not* from EPA's "action" per se. See *Public Citizen*, 541 U.S. at 769. The federal agency action in this instance–EPA's mandated role to approve State programs under narrowly-crafted statutory criteria–would not include or be responsible for any future effects that may arise under the State program because those effects are not part of or caused by the "agency action" for purposes of Section 7(a)(2) and the definition of "action" in 50 C.F.R. § 402.02. Section 7(a)(2) applies to "any action authorized, funded, or carried out" by EPA, and in this instance we are satisfied that the Congress has deliberately circumscribed the role "carried out" by EPA. Under Section 402(b) of the CWA, EPA carries out the limited function of comparing a state NPDES program to the narrow criteria of the statute. If the criteria are met, Congress has determined that the state NPDES permitting regime is approved. Future adverse effects, if any, from the state's permitting activities are the result of an Act of Congress, not a result of EPA's narrow adminis-

trative decision. We agree that EPA's role in the approval process established by Congress does not make it responsible for impacts to listed species from any resulting state-issued permits, and EPA is not subject to the duties of ESA Section 7(a)(2) in this instance.

We agree with your assertion that the ESA does not override limitations on EPA's substantive authority under Section 402(b) of the CWA. The legislative history reveals that Section 7 originated as a single paragraph in which agencies were instructed to "utilize their authorities" to both carry out programs for the conservation of listed species and to insure that actions authorized, funded or carried out by the agency avoided jeopardy or destruction of critical habitat. Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). When Congress separated Section 7 into separate sentences in 1978, it explained that this revision merely restated "existing law." See H.R. Conf. Rep. No. 95-1804, at 18 (1978), reprinted in 1978 U.S.C.C.A.N. 9484, 9486. The sentence containing the no-jeopardy requirement was simply a particular and mandatory application of the general provision in the preceding sentence for agencies to utilize their authorities in furtherance of the purposes of the Act in carrying out conservation programs. Section 7(a) was then broken into separate subsections the following year, Pub. L. No. 96-159, Sec. 4, 93 Stat. 1226, but again without substantive change. Thus, we agree with your conclusion that Congress intended the "utilize their authorities" limitation to apply fully to Section 7(a)(2). This legislative history confirms that this provision does not override limitations on EPA's authority under a statute such as CWA 402(b). Without repeating the cases you cited in your letter, courts likewise have determined that there is nothing in the language of the

ESA to indicate that Congress intended for Section 7 to override limitations on existing agency authority.

This interpretation of section 7 is also reflected in the statute and regulations related to reasonable and prudent alternatives (RPAs), which are necessary if a proposed action is likely to cause jeopardy or adverse modification. The ESA states that the Secretary "shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and *can be taken by the Federal agency* or applicant in implementing the agency action." ESA Section 7(b)(3)(A) (emphasis added). Further, the regulations limit RPAs to actions that "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. §402.02. The preamble to those regulations states that in order for an alternative to be reasonable and prudent, it "should be formulated in such a way that it can be implemented by a Federal agency consistent with the scope of its legal authority and jurisdiction." 51 Fed. Reg. 19937 (1986).

Further, we agree with your assertion that the section 7 regulations specifically limit the applicability of Section 7 duties to discretionary agency actions. The Section 7 regulations clearly state that the consultation requirement applies to "actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. The regulations also limit reinitiation of consultation to those situations where "discretionary" involvement or control has been retained. 50 C.F.R. § 402.16. Further, the preamble to these regulations notes that a Federal agency's responsibilities under section 7(a)(2) cover the range of "discretionary authority" held by that agency. 51 Fed. Reg. 19937 (1986). Consistent with our

analysis of the statute as expressed above, this regulation makes clear that Section 7 does not require agencies to act on grounds of species protection where the agency, either because of statutory limitations or previous contractual obligation, lacks legal discretion to do so. This letter confirms our interpretation of the regulation, 50 C.F.R. 402.03, which the Ninth Circuit misconstrued in *Defenders of Wildlife*. That regulation thus reinforces our conclusion in connection with the Arizona approval and here that EPA's approval of a state application is not the cause of any impacts that activities requiring NPDES permits may have on listed species or their critical habitat.

For the above reasons, and taking into consideration the cases cited in your letter, we concur with EPA's interpretations of the ESA and the Services' regulations as applied to EPA approvals of State NPDES programs under CWA § 402(b). Further, we request that the Service, NOAA, and EPA meet to discuss the MOA to determine if adjustments should be made to reflect these interpretations.

Sincerely,

/s/ H. DALE HALL
H. DALE HALL
Director

APPENDIX E

[Seal Omitted] **United States Department of Commerce**
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910

THE DIRECTOR

[Dated: Oct. 18, 2006]

Benjamin H. Grumbles
Assistant Administrator
United States Environmental Protection Agency
Office of Water
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Mr. Grumbles:

In a letter dated October 13, 2006, the Environmental Protection Agency (EPA) requested that the National Marine Fisheries Service (NMFS) indicate its position concerning EPA's obligation to consult under Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536 (a)(2), when EPA takes action on a State's application to administer the National Pollutant Discharge Elimination System (NPDES) program pursuant to Section 402(b) of the Clean Water Act (CWA), 33 U.S.C. § 1342(b).

Your letter states that EPA has no discretion to disapprove such an application based upon criteria that are not

listed in Section 402(b) itself, and that protection of listed species is not within any of the listed criteria. You state your understanding that Section 7 of the ESA does not expand EPA's authority to address the protection of listed species if Congress limited the Agency's ability to consider such concerns. You further note that regulations issued by the Department of the Interior and the Department of Commerce interpret ESA Section 7 duties as inapplicable if an agency lacks "discretionary involvement or control" over its action sufficient to benefit listed species or designated critical habitat. 50 C.F.R. § 402.03. Accordingly, your letter concludes that Section 402(b)'s mandate to approve State applications precludes the jeopardy avoidance and consultation duties of ESA Section 7(a)(2). You asked for confirmation that NMFS agrees with your analysis with regard to ESA Section 7 and its implementing regulations. As discussed below, and consistent with your conclusion on the lack of discretion under the CWA in rendering EPA's approval, we concur with your conclusion.

As you are aware, NMFS previously consulted with EPA on the transfer of the NPDES program to States. Further, in January 2001, NMFS, the Fish and Wildlife Service, and EPA entered into a Memorandum of Agreement (MOA) regarding enhanced coordination under the CWA. The MOA included provisions for consultation on the transfer of the NPDES program. However, these earlier consultations and the adoption of the MOA did not fully consider the impacts of the statutory mandate in Section 402(b) of the CWA on the agencies' responsibilities under Section 7 of the ESA.

We have reexamined these issues and conducted a more extensive examination of the statutory and regulatory

provisions that govern Section 7 consultation in view of the State of Alaska's recent application to EPA to administer the NPDES program there. We also take note of the consultation between EPA and the Fish and Wildlife Service on the Arizona application to administer the NPDES program in that State, the consequent decision in *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946 (9th Cir. 2005), *rehearing en banc denied*, 450 F.3d 394 (2006), and other recent court rulings. We now conclude that EPA is not required to consult on applications to approve State programs in situations under Section 402(b) of the CWA.

We agree that the ESA does not override limitations on EPA's substantive authority under the CWA. The legislative history reveals that Section 7 originated as a single paragraph in which agencies were instructed to "utilize their authorities" to both carry out programs for the conservation of listed species and to insure that actions authorized, funded or carried out by the agency avoided jeopardy or destruction of critical habitat. Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). When Congress separated Section 7 into separate sentences in 1978, it explained that this revision merely restated "existing law." See H.R. Conf. Rep. No. 95-1804, at 18 (1978), reprinted in 1978 U.S.C.C.A.N. 9484, 9486. The sentence containing the no-jeopardy requirement was simply a particular and mandatory application of the general provision in the preceding sentence for agencies to utilize their authorities in furtherance of the purposes of the Act in carrying out conservation programs. Section 7(a) was then broken into separate subsections the following year, Pub. L. No. 96-159, Sec. 4, 93 Stat. 1226, but again without substantive change. Thus, Congress intended the "utilize their au-

thorities" limitation to apply fully to Section 7(a)(2). This legislative history confirms that this provision does not override limitations on EPA's authority under a statute such as CWA Section 402(b). Without repeating the cases cited in your letter, courts likewise have determined that there is nothing in the language of the ESA to indicate that Congress intended for Section 7 to override limitations on existing agency authority.

This interpretation of section 7 is also reflected in the statute and regulations related to reasonable and prudent alternatives (RPAs), which are necessary if a proposed action is likely to cause jeopardy or adverse modification. The ESA states that the Secretary "shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and *can be taken by the Federal agency* or applicant in implementing the agency action." ESA Section 7(b)(3)(A) (emphasis added). Further, the regulations limit RPAs to actions that "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. §402.02. The preamble to those regulations states that in order for an alternative to be reasonable and prudent, it "should be formulated in such a way that it can be implemented by a Federal agency consistent with the scope of its legal authority and jurisdiction." 51 Fed. Reg. 19937 (1986).

Further, we agree with your assertion that the Section 7 regulations specifically limit the applicability of Section 7 duties to discretionary agency actions. The Section 7 regulations clearly state that the consultation requirement applies to "actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. The regulations also limit reinitiation of consultation to those

situations where "discretionary" involvement or control has been retained. 50 C.F.R. § 402.16. The preamble to these regulations notes that a Federal agency's responsibilities under Section 7(a)(2) cover the range of "discretionary authority" held by that agency. 51 Fed. Reg. 19937 (1986). Consistent with our analysis of the ESA as expressed above, this regulation makes clear that Section 7 does not require agencies to act to protect a listed species if the agency, because of statutory limitations, lacks legal discretion to do so. This letter confirms our interpretation of the regulation.

Our conclusion also is supported by the Supreme Court decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), which held that the purposes and policies behind a particular statutory regime should be taken into account in determining questions of causation and federal agency responsibility for future effects that may arise from agency actions. In the context of Section 7 consultation, the Services have construed the ESA to require consideration of both "direct effects" and "indirect effects" of an agency action. See 50 C.F.R. §§ 402.02, 402.14(g). As stated in your letter, State programs that meet the requirements of Section 402(b) of the CWA must be approved, and any evaluation of the effects arising from that decision would be speculative. Any such adverse effects therefore result from Congress's decision to mandate the approval of the State program—not from EPA's "action." See *Public Citizen,* 541 U.S. at 769. The federal agency action in this instance—EPA's mandated role to approve State programs under narrow statutory criteria—would not include or be responsible for any future effects that may arise under the State program because those effects are not part of or caused by the "agency action" for purposes of Section

7(a)(2) and the definition of "action" in 50 C.F.R. § 402.02. Section 7(a)(2) applies to "any action authorized, funded, or carried out" by EPA, and in this instance we are satisfied that the Congress deliberately circumscribed the role "carried out" by EPA. Under section 402(b) of the CWA, as EPA has interpreted it, EPA carries out the limited function of comparing a State NPDES program to the narrow criteria of the statute. If the criteria are met, Congress has determined that the state NPDES permitting regime should be approved. Future adverse effects, if any, from the State's permitting activities are the result of an Act of Congress, not a result of EPA's narrow administrative decision. We agree that EPA's role in the approval process established by Congress does not make it responsible for impacts to listed species from any resulting state-issued permits, and EPA is not subject to the duties of ESA Section 7(a)(2) in this instance.

For the above reasons, we concur with EPA's conclusion that EPA is not required to engage in Section 7 consultation on applications to approve State programs in situations under Section 402(b) of the CWA.

Sincerely,

/s/ WILLIAM T. HOGARTH III
WILLIAM T. HOGARTH, Ph.D.
Assistant Administrator
for Fisheries

APPENDIX F

1. 16 U.S.C. 1536 provides in pertinent part:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for' the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an

endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a) (2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if

the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

* * * * *

2. 33 U.S.C. 1342(b) provides:

National pollutant discharge elimination system

* * * * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require re ports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the per mit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be

subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.